

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 SKYLINE STEEL, LLC,

4 Plaintiff,

5 v.

13 CV 8171 (JMF)

6 PILEPRO, LLC,

7 Trial

8 Defendant.

9 -----x
10 New York, N.Y.
11 November 29, 2016
12 9:18 a.m.

13 Before:

14 HON. JESSE M. FURMAN,

15 District Judge

16 APPEARANCES

17 WINSTON & STRAWN LLP
18 Attorneys for Plaintiff
19 BY: ALDO A. BADINI
20 MERRITT D. WESTCOTT
21 FRANK S. RESTAGNO

22 JULIO J. RAMOS
23 Attorney for Defendant
24 - and -
25 CONLEY ROSE, PC
BY: DARLENE F. GHAVAMI
- and -
THE BROWN FIRM LLC
BY: ANDREW BROWN

1 (Case called)

2 MR. BANDINI: Good morning, your Honor. Aldo Badini
3 for Skyline Steel LLC.

4 MS. WESTCOTT: Merritt Wescott for Skyline Steel.

5 MR. RESTAGNO: Good morning, your Honor. Frank
6 Restagno for Skyline Steel.

7 MR. DeMEY: Good morning. Laurent De Mey for Skyline
8 Steel.

9 THE COURT: All right.

10 MR. RAMOS: Julio Ramos for the PilePro defendants.
11 Good morning.

12 MS. GHAVIMI: Darlene Ghavimi for PilePro LLC.

13 MR. BROWN: Andy Brown for PilePro.

14 THE COURT: Good morning to all of you. Welcome
15 Ms. Ghavimi and Mr. Brown to New York.

16 There are a couple of deposition designation
17 objections that I had reserved judgment on pending discussion
18 with you. In particular, some relevance objections that at
19 this point I have an inadequate basis to sort of understand
20 where the relevant testimony fits in or doesn't, as the case
21 may be.

22 So that is on my agenda. Is there anything else that
23 we need to discuss? I think I've resolved all of -- other than
24 the ones that I explicitly reserved on, I resolved all the
25 objections in the first four depositions that Skyline had

1 submitted. I didn't realize until I went through it this
2 morning there were no objections in the Wheeler, L.B. Foster
3 depositions. I don't think there are any issues there.

4 So we'll turn to the relevance objections that I had
5 reserved on in a moment. Anything else? Ms. Ghavimi seems to
6 be popping up and down.

7 MS. GHAVIMI: Yes, your Honor. There was one issue
8 with respect to the Madonna transcript. This was discovered
9 last night during the parties' meet and confer. It regards
10 PilePro's counterdesignations. When PilePro --

11 THE COURT: Could you move the microphone. The
12 acoustics in here are quite poor, so you really need to make
13 sure that you speak into the microphone. Go ahead.

14 MS. GHAVIMI: When PilePro made its
15 counterdesignations, I was making those counterdesignations. I
16 was using a text version of the transcript. And when Skyline
17 interpreted those, they used a condensed version of the
18 transcript; and, therefore, the actual testimony that was
19 designated was incorrect. We only discovered this last night.
20 However, we're at an impasse as to what to do about it.
21 Therefore, the objections that they made were not really the
22 testimony that was actually designated two months ago.

23 I have a highlighted version of the transcript with
24 the actual counterdesignations that were made two months ago
25 for your review, and I sent this to Skyline's counsel this

1 morning for them to review as well.

2 THE COURT: I don't understand what this issue --
3 where this issue comes from? You designated these things on
4 September 30, and it's now November 29. The notion that you
5 would discover this the night before we're scheduled to start
6 trial, I don't understand, and I don't understand what you mean
7 by condensed version versus text version. The whole point of
8 having page numbers and line numbers is so everybody is working
9 on the same page and can actually be talking about the same
10 testimony. So I don't understand even what you're talking
11 about.

12 MS. GHAVIMI: Your Honor, I absolutely agree.
13 Unfortunately, we didn't -- this was an honest mistake. The
14 parties didn't realize it. Nobody reached out earlier to
15 either -- to anybody to discover this. And the point is that
16 what Skyline thought that PilePro designated was not what was
17 actually designated because we were using a different version,
18 a text version that is a rough version. That was the only copy
19 that I had. I had just started coming onto the case only two
20 days earlier. I was rushing to get this done. I used what I
21 had. And what they objected to was not what I actually
22 designated two months ago in submission with the pretrial
23 order.

24 THE COURT: Well, I can tell you that what is not
25 going to fly is "I'm new to the case and that should excuse my

1 mistake." Your client has been through, if my memory serves
2 me, three or four different lawyers in this case. The fact
3 that they chose to bring on a new lawyer at the last minute is
4 not going to justify your failing to deal with whatever you
5 should have dealt with.

6 So now that's a general comment. Mr. Badini or
7 someone at the front table want to tell me your thoughts or
8 what the issues are here.

9 MR. BANDINI: Your Honor, my colleague, Mr. Restagno,
10 will address this motion in detail. I will make one comment,
11 though, which is that it is not true that we did not reach out
12 and point out that there were problems. And Mr. Restagno can
13 address the issue.

14 MR. RESTAGNO: Your Honor, good morning.

15 THE COURT: Microphone, please.

16 MR. RESTAGNO: Yes. Skyline most certainly made clear
17 the problems with PilePro's designations in the pretrial order
18 by objecting very clearly each time on the specific grounds of
19 incomplete designation or, in some cases, improper
20 counterdesignation. We created those designations specifically
21 to highlight the fact that there were some incoherent citations
22 to the transcript. PilePro has been on notice of this for two
23 months, since the filing of the pretrial order with those
24 objections.

25 And furthermore, your Honor, for PilePro now to argue

1 that they were -- that this was the only copy that they had is
2 inconsistent with the fact that their primary designations on
3 the very same testimony that counsel is talking about are
4 correct. They line up. She's talking only about their
5 counterdesignations, which for some reason was based on some
6 other transcript that we knew nothing about until -- which we
7 did not see until this morning.

8 MS. GHAVIMI: Your Honor, if I may just address those
9 points. The counter -- the initial primary designations were
10 correct. As I explained to counsel last night when we
11 discussed this issue, were made by Mr. Ramos. He was working
12 from a Word -- a paper copy, which had the correct -- which was
13 different from the copy that I had. And they made objections
14 to my -- to the counterdesignations of PilePro, yes, and the
15 parties attempted to meet and confer on both parties'
16 deposition designations, counterdesignations, and objections,
17 but we were told on multiple occasions by Ms. Wescott that we
18 would delay this meet and confer because Skyline was in the
19 process of paring down its deposition designations. And
20 therefore, we waited, and the issue was tabled until last
21 night.

22 THE COURT: Well, I think in a moment we should talk
23 about what is specifically at stake here, but I do have a
24 question. I'm looking at the original counterdesignations and
25 objections that were filed with the joint pretrial order on

1 September 30, and there is, for example, a counterdesignation
2 on page 17 -- excuse me, page -- actually, forget that.

3 Why don't you tell me what's specifically at stake
4 here. I have to tell you, I'm -- you have an uphill battle
5 here because I'm looking at the original counterdesignations
6 and objections, and they correspond with exactly what was
7 submitted last night. You had two months to raise that. Your
8 letter last night is another example of where one lawyer says
9 something, and you come in and you say something else. That's
10 not going to fly here. You speak on behalf of your client.

11 He's hired multiple lawyers. That's fine by me if
12 you're all on the same page. What I'm not going to allow you
13 to do is let one lawyer stand up to say: This is not issue,
14 Judge, and we consent this, and another lawyer to come in at
15 the 11th hour, the night before we scheduled for trial and say
16 we're going to re-argue this point. That's not happening in
17 this courtroom, all right. And this seems like another
18 instance of that.

19 Now, if you want to talk about specifics, let's talk
20 about specifics, but you have an uphill battle here. Go ahead.

21 MS. GHAVIMI: Your Honor, I'm not trying to retract
22 the counterdesignations that were made two months ago.

23 THE COURT: No, but you are trying to change the
24 landscape of your counterdesignations. I have ruled on the
25 objections with respect to your counterdesignations and

1 sustained any number of those objections because, frankly, the
2 counterdesignations were incoherent. They were incomplete. To
3 pick an example, on page 17 the counterdesignation starts on
4 the second line of a two-line question, and that includes a
5 question but not the answer. They're obviously patently
6 problematic, no pun intended.

7 You've had two months to realize that and to look at
8 it, and I don't know if that's on you or if that's on
9 Mr. Ramos. But what you can't do is come to me the morning
10 trial is supposed to start and say: Oops, we messed up. One
11 of us didn't look at it. That's just not the way this process
12 works. It's not fair to Skyline, it's not fair to me, and it's
13 not the way the process works.

14 MS. GHAVIMI: Your Honor, if I may submit a copy of
15 the actual testimony that was supposed to be designated, and I
16 can explain to you specifics?

17 THE COURT: You may. Do you have a copy for Skyline?

18 MS. GHAVIMI: I do. For example --

19 THE COURT: Hold on. All right. You may proceed.

20 MS. GHAVIMI: If you go to page -- the bottom says
21 page 16, but that's not the actual page of the transcript. The
22 page of the transcript are the numbers that are on the
23 right-hand side.

24 THE COURT: Yes.

25 MS. GHAVIMI: So in the middle of the page you see 19

1 on the right-hand side above it.

2 THE COURT: Yes.

3 MS. GHAVIMI: The actual designations for page 18 was
4 line 18 to 21: "Question: Did Skyline Steel furnish this
5 indemnification to" --

6 THE COURT: You need to read more slowly so the court
7 reporter can take your -- take down what you're saying. But I
8 can also read, so you don't need to read.

9 MS. GHAVIMI: Okay. I will not read it into the
10 record. However, this was the intended designation, not an
11 incomplete, nonsensical designation. For example, another
12 example, turning to the next page --

13 THE COURT: Where does this correspond to the actual
14 transcript that was submitted to me last night?

15 MS. GHAVIMI: It is the same page number and line
16 number, 19 -- well --

17 THE COURT: No, it's not, because that's --

18 MS. GHAVIMI: Where does it correspond? I apologize.
19 I have not done that correspondence. I can find it.

20 THE COURT: Seems to be page 23, lines 7 through 10,
21 which I don't know what to tell you. Not to mention it seems
22 to be designated, if I'm not mistaken, by Skyline.

23 MS. GHAVIMI: This is how this mistake occurred. And
24 what we're just asking is, yes, this section is already
25 designated by Skyline, but other counterdesignations are not.

1 And we --

2 THE COURT: All right. Why don't you pick your
3 battles and tell me which ones are absolutely critical to you,
4 because right now I'm not allowing you to redo any of this
5 because it's on you. The fact that Mr. Ramos correctly
6 designated your affirmative designations makes abundantly clear
7 that PilePro had the correct transcript. You could have worked
8 off it. You could have corresponded with one another and made
9 sure you were on the same page. And the fact that you didn't
10 and didn't realize it until last night is your fault, not my
11 fault.

12 What can't happen is at the 12th hour at this point to
13 basically shift the sands of the foundations of the way this
14 process works and start over. It's just not going to happen.
15 So if you want to pick your one or two that you are most
16 concerned about, I'll look at them and I'll consider it, but
17 right now it's not going to fly.

18 MS. GHAVIMI: Your Honor, the one we're most concerned
19 about is page 51 in this text document.

20 THE COURT: Meaning at the bottom it says page 51?

21 MS. GHAVIMI: Yes. Yes, at the bottom page 51.

22 THE COURT: And the entire portion that's highlighted
23 in blue?

24 MS. GHAVIMI: Yes. And I see that that's been
25 designated by Skyline.

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1 THE COURT: Yes, this entire part is already in.

2 All right. We're done with this. Let's move on to
3 the next issue. Is there anything beyond the relevance
4 objections that I reserved judgment on?

5 All right. Then let's deal with those. I'm told that
6 we should have a jury pool in a matter of minutes, so we'll
7 continue until we have the jury here, at which point we will
8 obviously begin with voir dire.

9 Let's start with the McShane deposition transcript,
10 the March 12 deposition testimony. First is page 40. Well,
11 looks like we have a jury pool here, so we will table this
12 until another time.

13 MS. WESTCOTT: Your Honor, at some point we do need to
14 talk about some objections to demonstratives used in opening.

15 THE COURT: We'll have an opportunity to do that
16 before openings.

17 MS. WESTCOTT: Okay.

18 THE COURT: I did ask if there was anything else, and
19 nobody said anything. But in any event, we will proceed with
20 jury selection and then take those up at a break.

21 (Jury selection ensued)

22 (Continued on next page)

1 (In open court)

2 (A jury of 8 people were chosen and sworn)

3 THE COURT: You may be seated. So, when you come back
4 in the jury room after our break, I think it would make sense
5 for you to sit in the first row and then jurors number 7 and 8
6 in the second row. If you could remember who is to your left
7 or right or essentially what number juror you are, if you line
8 up in that order as you come out, it will just make it easier,
9 and Ms. Johnson can just fill in the first row and everybody
10 else down to seat number six, and then jurors numbers 7 and 8
11 can just find seats in the second row.

12 Now, good morning. It's still morning. This case is
13 now officially on trial. As stated earlier, the trial is
14 scheduled to last no more than two weeks, but I hope that it
15 may end even sooner than that. We will begin tomorrow and
16 additional days thereafter at 9 o'clock, and to help ensure
17 that we can start on time, please be in the jury room no later
18 than a few minutes before nine. I will actually deal with
19 issues with the lawyers at nine, but shortly after nine, at
20 9:15 I hope each day we will be able to start promptly with the
21 portion of the case that involves you. But to do that you need
22 to be here on time. We can't begin until all eight of you are
23 here. So, I will ask you and remind you as we break today make
24 sure you are here on time tomorrow so that we can begin without
25 delay. As an enticement for you to begin on time, I have

1 arranged to get some breakfast and coffee for you in the jury
2 room. As I told you, we will, beginning tomorrow, take one and
3 only one break and a relatively short one at that, about 30
4 minutes, so you should, number one, really given how short the
5 break is, plan to remain in the jury room during the break, but
6 you may want to bring some food or small snack or even a small
7 lunch to tide you over until the end of the day, and we will
8 finish each day at 2:30 as I mentioned.

9 Now, the food that we get you for the morning may also
10 be enough to get you through the day, but in any event, I will
11 leave that to you.

12 Now that you have been sworn, let me give you some
13 instructions about your duties as jurors. At the end of the
14 trial I will give you more detailed instructions, and those
15 instructions will control our deliberations in this case. But
16 for now let me explain how the trial will proceed.

17 The first step in the trial will be the opening
18 statements. First, the plaintiff's lawyer will make an opening
19 statement, and then the defendant's lawyer will make an opening
20 statement.

21 Opening statements are neither evidence nor argument;
22 they are simply outlines to help you understand the evidence as
23 it is presented. After opening statements the plaintiff will
24 present its evidence. The plaintiff's evidence will consist of
25 the testimony of witnesses as well as documents and exhibits.

1 And witnesses will be testifying live here in person in the
2 witness box. You will also see some witness testimony through
3 what are known as depositions, which are essentially videotaped
4 examinations of the witness, and I will explain that to you
5 more fully at the time.

6 So, the plaintiff's evidence will consist, as I said,
7 of the testimony of witnesses, as well as documents and
8 exhibits. Plaintiff's lawyer will examine the witnesses, and
9 the defendant's lawyer may cross-examine them. Following the
10 plaintiff's case, the defendant may present a case, and if it
11 does, the plaintiff's lawyer will have an opportunity to
12 cross-examine any witnesses testifying for the defendant.

13 After the presentation of evidence is completed, the
14 lawyers will deliver their closing arguments to summarize and
15 interpret the evidence. Just as the lawyers' opening
16 statements are not evidence, their closing arguments are not
17 evidence either. Following closing arguments, I will instruct
18 you on the law. Then you will retire to deliberate on your
19 verdict which must be based solely on the evidence presented at
20 trial. All of you must agree on any verdict. And while that
21 verdict will obviously be public, your deliberations are
22 secret. You will never have to explain your verdict to anyone.

23 It is important to remember that this is a civil case.
24 You may have heard of the "beyond a reasonable doubt" standard
25 that applies in criminal cases. That requirement does not

1 apply in a civil case, and you should put it entirely out of
2 your mind. In civil cases, the burden is different, and it is
3 called proof by a preponderance of the evidence. To establish
4 facts by a preponderance of the evidence means to prove that
5 the fact are more likely are true than not true. I will,
6 however, instruct you fully on the burden of proof after all of
7 the evidence has been received.

8 Now let me explain the jobs that you and I are to
9 perform during the trial. I will decide which rules of law
10 apply to the case. I will decide that by making legal rulings
11 during the presentation of the evidence and, also, as I told
12 you, in giving the final instructions to you at the close of
13 the evidence and the closing arguments of the lawyers.

14 In order to do my job, I may have to interrupt the
15 proceedings from time to time to confer with the lawyers about
16 the rules of law that should apply here. Sometimes we may talk
17 here at the bench, at the side bar, as we did during some of
18 jury selection, out of your hearing, but some of the
19 conferences may take more time than others, and as a
20 convenience to you, I may excuse you from the courtroom. I
21 assure you that I will try to keep any such interruptions to an
22 absolute minimum, and indeed will hope to avoid them
23 altogether. But please be patient and understand that these
24 conferences are necessary to ensure the fairness of the trial
25 and that ultimately they do serve to make the trial move

1 faster. While I decide the law that applies to the case, you,
2 the members of the jury, are the triers of fact. You will
3 weigh the evidence presented and decide whether the plaintiff
4 has proved by a preponderance of the evidence that the
5 defendant is liable to it. You must pay close attention to all
6 of the evidence presented, and you must base your decision only
7 on the evidence in the case and my instructions on the law.

8 What then is evidence? Evidence consists only of the
9 testimony of witnesses, documents and other things admitted as
10 evidence, or stipulations agreed to by the parties. Some of
11 you probably have heard the terms circumstantial evidence and
12 direct evidence. Do not be concerned with these terms for now.
13 You are to consider all the given in this trial. Certain
14 things are not evidence and must not be considered by you. The
15 following is a list of what is not evidence.

16 First, arguments, statements and questions by the
17 lawyers are not evidence, nor are statements that I make or
18 questions that I ask of a witness.

19 Second, objections to questions are not evidence.
20 Lawyers have an obligation to make an objection if they believe
21 that evidence being offered is improper under the rules of
22 evidence. You should not be influenced by the objection or by
23 my rulings on any objection. If an objection is sustained,
24 ignore the question and any answer that may have been given.
25 If an objection is overruled, you should treat the answer like

1 any other. If you are instructed that some item of evidence is
2 received for a limited purpose only, you must follow that
3 instruction as you do all my instructions.

4 Third, testimony that I have excluded or told you to
5 disregard is not evidence and must not be considered.

6 Fourth, anything that you have seen or heard outside
7 the courtroom is not evidence and must be disregarded. You are
8 to decide the case solely on the evidence presented here in the
9 courtroom. There is no formula to evaluate testimony or
10 exhibits. For now, suffice it to say, that you bring with you
11 into this courtroom all of experience and background of your
12 lives. Do not leave your common sense outside the courtroom.
13 The same types of tests that you use in your everyday dealings
14 are the tests that you should apply in deciding how much
15 weight, if any, to give to the evidence in this case. The law
16 does not require you to accept all of the evidence admitted at
17 trial. In determining what evidence you accept, you must make
18 your own evaluation of the testimony from each of the witnesses
19 and the exhibits that are received in evidence.

20 It is essential, however, that you keep an open mind
21 until you have heard all of the evidence in the case. A case
22 can be presented only step by step, witness by witness, before
23 all the evidence is before you. As you know from experience,
24 you can hear one person give his or her version of an event and
25 think it sounds very impressive or even compelling and yet upon

1 hearing another version of the same event, or even the same
2 person cross-examined with respect to the event, things may
3 seem very different. In other words, there may be another side
4 to any witness's story. You should use your common sense and
5 good judgment to evaluate each witness's testimony based on all
6 of the circumstances. Again, I cannot emphasize too strongly
7 that you must keep an open mind until the trial is over. You
8 should not reach any conclusions until you have all the
9 evidence before you.

10 Finally, let me caution you about certain rules and
11 principles governing your conduct as jurors in this case.
12 First, you must not talk to each other about this case or about
13 anyone who has anything to do with the case until the end of
14 the case when you go to the jury room to decide on your
15 verdict. The reason for this requirement is that you must not
16 reach any conclusion on the claims or defenses until all of the
17 evidence is in and you have heard my instructions. As I have
18 said, keep an open mind until you start your deliberations at
19 the end of the case.

20 Second, do not communicate with anyone else about this
21 case or with anyone who has anything to do with it, until the
22 trial has ended and you have been excused or discharged as
23 jurors. "Anyone else" includes members of your family and
24 friends, and "no communicating" about the case means no
25 communicating in any way, shape or form, in person, by e-mail,

1 by telephone, by text, on Facebook, Twitter, Google, blogs or
2 whatever, at all. You may tell your family and your friends,
3 as well as your employer, that you have been selected as a
4 juror in a civil case, but, please, do not tell them anything
5 else about the case until you have been discharged by me. You
6 may think that tweeting something or posting something on
7 Facebook is harmless, but I can assure you that it isn't. And
8 if you do anything like that, that is, tweet or post anything
9 about the trial or about the participants in the trial, it will
10 be major inconvenience to everyone involved in the trial,
11 including and maybe especially to you, so don't do it.

12 Third, do not let anyone talk to you about the case or
13 about anyone who has anything to do with it. If any person
14 should attempt to communicate with you about this case at any
15 time throughout the trial, either in or out of the courthouse,
16 you must immediately report that to my deputy, Ms. Smallman,
17 and to no one else. When I say report that communication to no
18 one else, I mean that you should not tell anyone, including
19 your fellow jurors.

20 To minimize the probability of any such improper
21 communication, it is important that you go straight to the jury
22 room when you come in in the morning and that you remain in the
23 jury room for the duration of the trial day other than when you
24 are in the courtroom.

25 Ms. Smallman, after I excuse you, will show you where

1 the jury room is and also show you where the door is to the
2 jury room. That is to say after you are excused, you should
3 not come into the main door of the courtroom. There may be
4 other proceedings going on, or I may be discussing things with
5 the lawyers. You should go directly into the jury room using
6 the designated door that Ms. Smallman will show you. In
7 addition, you should use the bathrooms in the hallway right
8 outside the jury room rather than the bathrooms that are in the
9 lobby of this floor or elsewhere in the courthouse. As you
10 were probably already told, you should not use the courthouse
11 cafeteria. I apologize for that on such a rainy or dreary day,
12 but you should get food or refreshments outside the courthouse
13 rather than in the cafeteria. And you should not linger in the
14 public areas of the courthouse on this floor or elsewhere.

15 Now, given that beginning tomorrow we will be taking
16 only one break, it is, as I mentioned earlier, best that you
17 remain in the jury room if you can.

18 Fourth, do not do any research or investigation about
19 the case, or about anyone who has anything to do with the case
20 on your own. Don't go visit anyplace described in the trial.
21 Don't read, or listen to, or watch any news reports about the
22 case. Don't go on the Internet or use whatever digital or
23 communications device it is that you use to see what you can
24 learn to inform yourself about this matter. That is because
25 your decision in this case must be made solely on the evidence

1 presented at the trial. In other words, all that you need to
2 know to decide this case will be presented here in open court
3 by the parties. I expect you to inform me through Ms. Smallman
4 if you become aware of another juror's violation of these
5 instructions.

6 Finally, each of you will be given a notebook and a
7 pen. I think what I will do is during the break we will
8 actually put them on the seats in the jury box -- no, Ms.
9 Smallman is shaking her head. Excuse me, they are already in
10 the jury room. So, when you go to the jury room, Ms. Smallman
11 can point them out to you, and you bring those with you when
12 you come back after the break.

13 Now, this is because I permit jurors to take notes,
14 but you do not have to take notes. Notes are just an aid to
15 your own recollection. The court reporters in this case -- the
16 gentleman sitting right next to Ms. Smallman, and the woman who
17 was here earlier -- record everything that is said in the
18 courtroom, and any portion of the testimony that you hear can
19 be read back to you during your deliberations.

20 If you do take notes, be aware that note taking can
21 distract you from something important that is happening here on
22 the witness stand. And whether or not you take notes, you
23 should rely on your own recollections and don't be influenced
24 by the fact that another juror has taken notes. If you do take
25 notes, all notes must be left each day in the jury room. We

1 will make sure that they are secure there.

2 From this point until the time that you retire to
3 deliberate, it is your duty not to discuss this case and not to
4 remain in the presence of other people who may be discussing
5 this case. In that regard, please understand that the parties
6 and the lawyers in the case have been instructed to have no
7 contact with any of you. So, if you happen to see any of them
8 outside the courtroom and they do not acknowledge you, say
9 hello to you, make small talk, hold the door for you, or
10 anything of that sort, please do not take offense. They are
11 not being rude, I assure you. They are simply following my
12 instructions to ensure that both parties get a fair trial in
13 this case.

14 That concludes my preliminary instructions to you. As
15 I said, what we're going to do now is break for an early lunch.
16 It's 11:31. To ensure that you have enough time, that the
17 lawyers have enough time, and that we can take care of a few
18 remaining loose ends, I'm actually going to give you until one
19 o'clock today. I am normally not going to give you that much
20 time for a break, but today we will begin again at one o'clock.
21 So, please be back in the jury room let's say at five or ten
22 minutes to one. And again, Ms. Smallman will show you how to
23 enter the jury room to ensure that you don't come into the
24 courtroom before the appointed time.

25 A couple of reminders before I excuse you. Number

1 one, do not discuss the case with one another or with anyone
2 else, with your friends, your family or your employers. As I
3 mentioned, you may tell them that you have been selected to
4 serve as a juror in a civil case, but you should tell them
5 nothing else about the case. You should not discuss the case
6 with one another. You will have your time when it comes time
7 to deliberate, but until then it's important that you keep an
8 open mind and that you not discuss the case with each other.
9 Do not communicate about the case with anyone in person, by
10 e-mail, by phone or any means, and keep an open mind.

11 You obviously haven't heard the lawyers' opening
12 statements. You haven't heard any of the evidence in the case.
13 Really the case has not yet begun, so you don't know anything
14 about the case, and you haven't heard a lick of evidence, so
15 it's important that you keep an open mind.

16 Lastly, Mr. Woods, I know you had the appointments
17 that you mentioned to me earlier. If you could during the
18 break see if you can change those to the afternoon, after 2:30,
19 when we will be ending each day. That would be great. And if
20 you need my assistance in arranging that, you can let Ms.
21 Smallman know, and I will do what I can to help make sure that
22 that is not a problem for you.

23 With that, you are excused. Again, please be back in
24 the jury room, let's say, by ten to one, so that we can start
25 promptly at one o'clock, and I thank you for your attention,

1 and enjoy your lunches. Thank you. You can leave the
2 questionnaires on your chairs.

3 (Jury not present)

4 THE COURT: All right. Let's deal with the issues
5 that we need to address before openings. We will see how long
6 that takes. And then maybe we can go over other ground, but
7 otherwise we will take a break, let you guys get a bite as well
8 and prepare for openings, and then we will proceed directly to
9 the evidence after openings.

10 So tell me, there were some issues with respect to
11 demonstratives and other issues that you mentioned.

12 MS. WESTCOTT: Yes, your Honor. Last night the
13 parties exchanged the slides or exhibits that they were
14 intending to use in opening. Last night PilePro had some
15 objections to several of our slides which contain certain
16 statements of fact. I think that that was probably addressed
17 in your order of last night.

18 THE COURT: You mean statements of fact from the
19 stipulations?

20 MS. WESTCOTT: Yes, sir.

21 THE COURT: All right. Well, if they are on the
22 stipulations, then I think that is settled by my order of last
23 night.

24 MS. GHAVIMI: Your Honor, I would just like for
25 preservation of the record to renew our objection to those

1 particular identify statement of facts.

2 THE COURT: All right. So preserved, but I don't
3 think there is much to preserve there anyway. Next.

4 MS. WESTCOTT: Relatedly we had prepared a stipulation
5 of those statements of fact, and I think it has been signed by
6 both parties at this time, and we would like to admit it on
7 stipulation.

8 THE COURT: Let's do that after openings when the
9 evidentiary portion of the case begins. You can certainly
10 offer it at that time. But since openings are the first step,
11 we will wait until then.

12 MR. BADINI: Just so we understand the mechanics then,
13 before we call our first witness we should just offer it as an
14 exhibit?

15 THE COURT: I presume it's a stipulation between the
16 parties. We offer exhibit whatever it is, you know, which is
17 the stipulation of facts agreed to by the parties, yes.

18 MR. BADINI: Thank you, your Honor.

19 MS. WESTCOTT: With respect to PilePro's exhibits to
20 be used in opening, they propose to use two different videos.
21 Skyline objects to these videos.

22 The first video -- and I think that we have them
23 available if your Honor would like to see them, but I can
24 explain our objection -- the first video is of Mr. Wendt
25 explaining his ideas for a new company. I don't know that it's

1 a member of the PilePro group, either called Origami Steel,
2 that relates different patent and a method of making sheet
3 piles using lasers. So we think that the video is irrelevant,
4 first of all. Secondly, the beginning of the video makes
5 statements such as "America used to be good at making things,
6 and today we import everything." "These day American builders
7 are forced to buy low quality steel from abroad and wait a long
8 time for the orders." We believe this type of thing is
9 prejudicial under 403, particularly given the fact that this
10 case is about imported product from Europe.

11 THE COURT: And is this video on the exhibit list?

12 MS. WESTCOTT: No.

13 THE COURT: So I don't even understand on what basis
14 it would be shown at all. What's the second video, before I
15 hear from defense counsel?

16 MS. WESTCOTT: The second video, also not on the
17 exhibit list, appears to be a presentation made at least four
18 years ago about how the isheetpile website works. It's not
19 exactly a walk-through of the isheetpile website, but it's more
20 a PowerPoint presentation showing a mixed media of pages from
21 catalogs and a person clicking through the website. So our
22 objection to this would be of course we discussed using the
23 live website in court. It was decided not to do that.
24 Mr. Ramos objected to us doing the live website. It seems kind
25 of like an end-around in trying to get the website up, not to

1 mention the fact that it's four years old; it's not even the
2 same website; it doesn't even appear the same.

3 THE COURT: The threshold objection I assume is it's
4 not on the exhibit list and therefore it won't be in evidence.

5 MS. WESTCOTT: Yes.

6 THE COURT: OK. Mr. Ramos or Ms. Ghavimi, on what
7 possible basis should be you be allowed to show this to the
8 jury if it's not coming into evidence?

9 MS. GHAVIMI: Your Honor, these are demonstratives.
10 We are not intending to offer these into evidence, so of course
11 they would not appear on our exhibit list. Skyline's opening
12 statement has pictures in its PowerPoint presentation that are
13 not on their exhibit list. And from what I understand they are
14 not intending to offer those into evidence either.

15 The point of the -- let me take these first things
16 first -- the point of the Origami Steel video is a company
17 started and founded by Mr. Wendt. We are intending to show it
18 to demonstrate Mr. Wendt as a business owner, an innovator, the
19 fact that he has patents, he works in the steel business. The
20 statement that Ms. Westcott stated was prejudicial does not
21 mention Skyline or ArcelorMittal at all. It is referring to
22 the industry as a whole. And it was created not in connection
23 with this litigation; its a marketing video. It is intended to
24 describe and exemplify the owner of PilePro and his business
25 and describe him as an innovator in the industry. We are

1 certainly permitted to present our client in a positive light
2 as a counterpoint to Skyline's opening presentation which
3 highlights numerous holdings of this court that present our
4 client in a negative light, for instance, the court has held
5 that the Madonna letter was signed in bad faith.

6 (Continued on next page)
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1 THE COURT: All right. You're not going to show that
2 video. What about the second one?

3 MS. GHAVIMI: The second one is a tutorial of the
4 iSheet Web site that was also created about four years ago. It
5 just goes through how one would walk through the Web site were
6 one to use it. It doesn't mention --

7 THE COURT: But also not on the exhibit list?

8 MS. GHAVIMI: It's not intended to be introduced into
9 evidence. It's a demonstrative. It's intended to explain to
10 the jury -- have them have a visual of the Web site. We're not
11 intending to offer it into evidence.

12 THE COURT: But were you intending to show it to the
13 jury?

14 MS. GHAVIMI: Yes.

15 THE COURT: On what basis and through whom?

16 MS. GHAVIMI: Intending to show it in the opening, and
17 that's it.

18 THE COURT: Not happening. You don't get to show the
19 jury things just for the sake of showing the jury things and,
20 you know, persuading them -- making arguments to the jury. You
21 show the jury evidence. The jury can base its views and
22 deliberations on the evidence. And if there is evidence, you
23 can perhaps show it to the jury if it is appropriate to do, but
24 you can't get up and show them things that aren't going to come
25 into evidence. On top of which, four years ago is not within

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1 the time frame of this case, as far as I'm aware. Given that,
2 I don't think it would be appropriate. There's no foundation,
3 and it's not relevant. So not happening.

4 Anything else that we need to resolve with respect to
5 openings?

6 MS. WESTCOTT: No, your Honor, not with respect to
7 openings.

8 THE COURT: All right. I have the relevance issues
9 and the depositions that we can start to go through. Anything
10 else aside from that?

11 MS. WESTCOTT: Your Honor, our first live witness will
12 be Mr. De Mey. They have an objection to one of the exhibits
13 we intend to use with him on direct. That objection is to
14 Exhibit, Plaintiff's, 20, which is a copy of the ArcelorMittal
15 patent that is prior art --

16 THE COURT: You've got to keep your voice up. Say
17 again.

18 MS. WESTCOTT: I'm sorry. They're objecting to
19 Plaintiff's Exhibit 20. This is the U.S. patent to
20 ArcelorMittal that we are contending is prior art to PilePro's
21 patent in this case.

22 THE COURT: Okay.

23 MS. WESTCOTT: Their objection -- I'm sorry, your
24 Honor. Their objection is relevance. They don't believe it's
25 relevant to the case anymore.

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1 THE COURT: Why do you think this is relevant since
2 infringement and invalidity are not, at least directly, at
3 issue?

4 MS. WESTCOTT: The jury will not be asked to determine
5 the question of whether the patent is valid; however, if a
6 person accuses someone of infringing a patent that it knows to
7 be or should know to be invalid, that is also bad faith.

8 THE COURT: All right. Ms. Ghavimi.

9 MS. GHAVIMI: Your Honor, it's our position that
10 Mr. De Mey's belief about the validity or invalidity of the
11 '543 patent is completely irrelevant to Mr. Wendt's belief
12 about the validity of a patent and his --

13 THE COURT: Hold on. I didn't hear anyone suggesting
14 that Mr. De Mey was going to be testifying, sharing his belief,
15 about the validity of the patent. I agree with you. I don't
16 know what relevance that would have. The sole issue is just
17 whether the patent itself is admitted into evidence, as I
18 understand it.

19 MS. GHAVIMI: I can't see what other purpose they
20 would be asking questions of Mr. De Mey and this patent. He is
21 not the inventor. He's not any patent attorney who worked on
22 the patent. He has no knowledge. I don't see how he can --
23 how they could lay a foundation or he could authenticate it.

24 THE COURT: All right. I'll reserve judgment on that,
25 see if proper foundation is laid. If it is, I'll give you my

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1 ruling at the time.

2 Anything else aside from the deposition designations?

3 MS. GHAVIMI: No, your Honor.

4 MS. WESTCOTT: No, your Honor.

5 THE COURT: All right. So let's talk about those,
6 since we have a little bit of time now. Again, I think I was
7 starting with the March 12 deposition of Mr. McShane, page 40.
8 There is a relevance objection. And, again, just at this point
9 in time, without having heard your openings or much evidence
10 and notwithstanding my lengthy involvement in this case, I just
11 am having a hard time evaluating the relevance objections. So
12 it would be helpful to hear from you. If we can do this
13 briefly one by one, that would be helpful.

14 I guess it's Skyline's objection, so why don't I hear
15 first from Skyline.

16 MR. BANDINI: Your Honor, Mr. Restagno will be
17 addressing this.

18 MR. RESTAGNO: Thank you, your Honor.

19 THE COURT: This is page 40 and 41?

20 MR. RESTAGNO: Yes, that's right, your Honor. Our
21 objections to this testimony are grounded in relevance,
22 nonresponsiveness, and narration. But to focus on relevance,
23 if the Court doesn't mind, we believe that this line of
24 questioning is about -- it's about McShane's involvement in
25 Skyline's exploration into connector manufacturing. And so

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1 it's not quite responsive to the question posed, which was --
2 the question was his involvement in manufacturing. And the
3 answer gets into the relative size of Skyline, saying that
4 Skyline was on a growth campaign through acquisitions and
5 organic growth to expand it to a billion-dollar-a-year
6 operation. It also goes into the acquisition of PilePro.

7 So we think that this runs counter to the Court's
8 ruling in the motion in limine pertaining to the relative size
9 of the companies. It's an irrelevant topic, and we think it
10 could distract the jury. Furthermore, this implicates facts
11 that underlie the 2011 settlement agreement which would run
12 afoul of the Court's motion in limine two barring evidence on
13 prior litigations between the parties.

14 THE COURT: It doesn't mention the settlement.

15 All right. Ms. Ghavimi, Mr. Ramos, relevance?

16 MR. RAMOS: Your Honor, I think it's highly relevant.
17 This is an unfair practices case, and the specific business
18 conduct and comport of PilePro is at issue. This only provides
19 the jury with understanding with respect to the prior and
20 preexisting and, to some extent, continuing business
21 relationship between Skyline and PilePro. It is highly
22 relevant information, at least on the issue of background
23 between the parties, how the parties got to the position that
24 they're currently in in this litigation. And I think it's an
25 issue that is highly relevant, and it is responsive to

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1 understanding PilePro's market position and its competitive
2 posture vis-a-vis Skyline.

3 MR. RESTAGNO: Well, your Honor, I just don't see how
4 this is relevant to PilePro's accusations against Skyline
5 vis-a-vis the HZM system and the '543 patent. This testimony
6 is -- it really just seems to emphasize the relative size of
7 the companies, which is just an irrelevant factor.

8 THE COURT: All right. I'll sustain the objection.

9 Next is page 203. Again Skyline objection, so 203,
10 line 24 to 204, line 14.

11 MR. RESTAGNO: Yes. Thank you, your Honor. We object
12 on grounds of nonresponsiveness. The question posed was where
13 did -- essentially asked for where Mr. Wendt obtained his
14 information on lead times. And McShane's testimony toward the
15 end, beginning particularly at line 12, that the O-Pile system
16 was a short delivery and HZM was a product from Europe with
17 very, very long lead times is nonresponsive to the question of
18 where Mr. Wendt obtained that information. It's more of his
19 opinion, and we object on those grounds.

20 THE COURT: All right. Mr. Ramos.

21 MR. RAMOS: On that one, your Honor, it's pretty clear
22 on page 204, line 2 through lines 9, Mr. Wendt's response --
23 I'm sorry, Mr. McShane's response there in answering the
24 question specifically addresses how Mr. Wendt obtained the
25 information on lead times; how he had contacts with people in

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1 Europe, with the mills there; how he had contact with L.B.
2 Foster; how he was able to deduce the figures on lead times
3 based on that information. And I thought that this case was
4 partially an issue of the lead times and whether those were
5 confusing the market participants.

6 MR. RESTAGNO: Your Honor, if I may?

7 THE COURT: Hold on, please.

8 MR. RESTAGNO: Of course.

9 THE COURT: All right. I'm going to sustain the
10 objection with respect to line 3, page 204, line 3 through 14,
11 beginning with the word "but." I will allow the first portion
12 of the answer: "I am sure we did discuss it. I don't recall
13 the actual discussions." The rest will be omitted.

14 Next is page 219, lines 9 through 25. Skyline
15 objection, so Mr. Restagno.

16 MR. RESTAGNO: Yes. Thank you, your Honor. Once
17 again, we had testimony that implicates the settlement
18 agreement between the parties, and it's an end run around your
19 Honor's decision on motion in limine two disallowing evidence
20 of prior litigations. Specifically, the questioning: "Did you
21 ever complain to Skyline, anyone at Skyline, that Skyline was
22 not, to your satisfaction, displaying the PilePro connectors on
23 its marketing materials?" That was a duty that pertained to
24 settlement agreement between the parties in a prior litigation.

25 THE COURT: Mr. Ramos.

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1 MR. RAMOS: Just one second, your Honor.

2 I don't see, your Honor, how this has anything to do
3 with the settlement agreement. It has no issue with respect to
4 that. It's just a question and answer with respect to
5 PilePro's contacts with Mr. Borger prior to the complaint being
6 on file.

7 THE COURT: This references PilePro's -- that Skyline
8 was not displaying PilePro connectors in its marketing
9 materials satisfactorily. What does that have to do with this
10 case which concerns PilePro's representations and advertising?

11 MR. RAMOS: Your Honor, I think it's important to
12 understand what the business relationship was between the
13 parties, how they were engaged in commerce, how the issue of
14 competition has to be understood in that context with respect
15 to their prior arrangement and prior course of dealings. I
16 think the jury should understand that and should hear that type
17 of testimony.

18 THE COURT: All right. Objection's sustained.

19 The next one is page 221, line 16 to 25.
20 Mr. Restagno.

21 MR. RESTAGNO: Yes, your Honor. Thank you. This
22 appears to be just a continuation of the testimony that we were
23 discussing before. It implicates the duties under --

24 THE COURT: Can you move the microphone a little
25 closer, please.

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1 MR. RESTAGNO: My apologies. This touches on the same
2 issue that we just dealt with. This is, in effect, a
3 continuation of the testimony that we had just addressed that
4 implicated duties under the settlement agreement. It, in
5 effect, asks what Skyline's response was to the inappropriate
6 question asked before.

7 THE COURT: All right. Mr. Ramos.

8 MR. RAMOS: Again, your Honor, I would say that, in
9 defense of this line of questioning, it pertains to the market
10 conduct between PilePro and Skyline and the fact that Skyline
11 was using harsh and sharp tactics vis-a-vis PilePro. And I
12 believe the jury should understand the context of those
13 business dealings as well.

14 THE COURT: Objection's sustained. That, I think,
15 covers all disputes, objections, in the March 12 transcript.
16 If I missed any, I'm sure you'll bring them to my attention.

17 Let's turn to the March 13 transcript beginning, I
18 think, on page 40 as well. Can you give me one moment.

19 Page 40 to 41, again, it's Skyline's objection.
20 Mr. Restagno.

21 MR. RESTAGNO: Thank you, your Honor. Once again, we
22 had testimony that calls into question the relative sizes of
23 the two parties, and we believe inappropriately runs afoul of
24 motion in limine three. Specifically, testimony concerning
25 Skyline's possible acquisition of PilePro, which would

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1 implicate a relative size relationship that we feel is
2 inappropriate.

3 THE COURT: All right. Mr. Ramos.

4 MR. RAMOS: Once again, your Honor, this is showing
5 the specific employee, Mr. McShane, and his understanding of
6 where the market relationship was between PilePro and Skyline
7 and the fact that that relationship was of material
8 significance to Skyline to the degree that it was contemplating
9 acquisition of PilePro.

10 THE COURT: And what relevance does that have to the
11 claims in --

12 MR. RAMOS: Again, I think this is a market conduct
13 case, and it should be presented to the jury with respect to
14 what the issues were at the beginning and of the decline in the
15 relationship.

16 THE COURT: That objection is sustained as well.

17 Next is pages 62 to 63. Mr. Restagno.

18 MR. RESTAGNO: Thank you, your Honor. Calling the
19 Court's attention to page 62, line 17:

20 "Q. It says that during your employment as a corporate officer
21 at Skyline, you were personally involved in detailed
22 discussions with counsel for Skyline regarding the litigation
23 between Skyline and PilePro."

24 This has no relevance to the issues at hand. If your
25 Honor will direct his attention to line 11 of the same page,

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1 this testimony's based on a letter dated 2011. This is clearly
2 testimony related to a prior litigation and improper.

3 THE COURT: Mr. Ramos.

4 MR. RAMOS: We believe that the jury should understand
5 Mr. McShane's prior employment with Skyline and also the fact
6 that by virtue of his prior employment, that there was
7 basically breach of duty by Mr. McShane at PilePro in that he
8 had divided loyalties between Skyline and PilePro and that his
9 information at that particular point in time during the period
10 of time when he was employed by PilePro, that that information
11 should be provided to the jury in order to understand the
12 credibility of Mr. McShane's testimony.

13 THE COURT: How does this inform the jury's evaluation
14 of Mr. McShane's credibility?

15 MR. RAMOS: Well, it's our position, your Honor, that
16 he was a disloyal employee of PilePro and that as a result of
17 acts that he undertook, there was a market deterioration in
18 PilePro's relationship with Skyline because he was there
19 basically to undermine PilePro's ability to penetrate market
20 sectors that Skyline was dominating.

21 THE COURT: But all this is, is concerning a letter,
22 if I'm mistaken, from ArcelorMittal advising him of his
23 obligations of confidentiality to Skyline, notwithstanding the
24 fact that he was then working at a competitor, not to mention
25 it's before the time period relevant to this case.

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1 MR. RAMOS: I think it shows the depth of his
2 relationship and that he had a lot of market information with
3 respect to Skyline that -- that shows in this particular
4 context of Mr. McShane's testimony that he had divided
5 loyalties, your Honor. He had a lot of information about
6 Skyline.

7 THE COURT: Mr. Restagno, is there other testimony
8 concerning the fact that Mr. McShane previously worked at
9 Skyline that has been designated?

10 MR. RESTAGNO: Yes, your Honor.

11 THE COURT: All right. So I'll sustain the objection
12 on relevance and 403 grounds.

13 Now, I think there may be one more page, 71. I think
14 I understand the objection. Mr. Ramos, you want to tell me why
15 this is relevant and not confusing and prejudicial, given the
16 reference to the settlement agreement.

17 MR. RAMOS: Your Honor, just one second here, your
18 Honor. I would withdraw the designations that had anything to
19 do with the settlement agreement, given the Court's prior
20 ruling, but the remainder of the designated transcript we
21 believe is relevant to the issue of showing what type of sales
22 figures and market penetration PilePro had.

23 THE COURT: And what relevance does that have?

24 MR. RAMOS: Well, I think that -- isn't this case
25 about business competition and how the parties are relating to

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1 each other and how Skyline is basically trying to establish in
2 the eyes of the jury that it, in fact, has been damaged by
3 PilePro's acts? And I think the case law does show that, in
4 this context, the ability of the fact-finder to determine
5 damages can be established by sales figures by the competitor
6 as well. So these are sales figures that show or at least an
7 attempt to show by the witness the type of volume of sales that
8 PilePro was undertaking on a year-to-year basis.

9 THE COURT: All right. You keep on saying this case
10 is about the business relationship between the two entities.
11 It's really not. It's about the claims that the plaintiff has
12 brought against your client, and I don't think that -- to some
13 limited extent the background and the relationship between the
14 two entities may well inform that, but fundamentally, it's not
15 about who treated who well; it's about whether they can sustain
16 their burden of proof with respect to the specific claims that
17 are brought.

18 In any event, in the absence, first of all, there's no
19 explanation of what the settlement agreement is, let alone what
20 time period we're talking. And in the absence of that
21 testimony which you've withdrawn, there's absolutely no
22 reference to when this testimony concerns. So I fail to see
23 what relevance the size of PilePro has, really, at any time.
24 And given the absence of any time frame for that, I will
25 sustain that objection.

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1 That does -- McShane -- yes, Mr. Restagno.

2 MR. RESTAGNO: Your Honor, if I may, and apologies for
3 interrupting. We made, when we sent you the transcripts last
4 night, an inadvertent omission to our objection annotations in
5 this particular transcript. This is an objection that we made
6 in our pretrial order filed with the Court. In fact, I
7 could -- if I might direct your Honor to docket 503-4, page 10,
8 you'll find our objection lodged there. It's to the testimony
9 that PilePro designated as page 103 of this transcript.

10 THE COURT: Designated or counter designated?

11 MR. RESTAGNO: Designated, your Honor. So you'll see
12 when you turn to page 103 of the transcript that we submitted
13 last night, there's nothing there, but Skyline did lodge an
14 objection to that testimony in its pretrial order. It was a
15 clerical error that kept it off this particular transcript that
16 we e-mailed you last night.

17 For your Honor's convenience, if the Court hasn't
18 found its way to the pretrial order yet --

19 THE COURT: I have.

20 MR. RESTAGNO: Oh, okay. You will note our objections
21 are based on foundation, relevance, and speculation.

22 THE COURT: This is for only the portion on page 103
23 or also 104?

24 MR. RESTAGNO: It is on 103 and 104, that entire line
25 of questioning. It's a little complex here, but I could walk

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1 the Court through our objection.

2 THE COURT: What is the letter that's being discussed
3 here?

4 MR. RESTAGNO: Precisely. That is unknown based on
5 the designation. And if the Court were to read into the
6 non-designated testimony, it would learn that it's from a
7 letter that was sent to Parametrix, a letter that is not
8 germane to this case. And what's particularly dangerous about
9 this testimony is that it lacks that necessary background and
10 could lead the jury to conclude or perhaps confuse them into
11 thinking that this is testimony about the Madonna letter which
12 is at issue in this case.

13 THE COURT: All right. Mr. Ramos.

14 MR. RAMOS: Your Honor, that Parametrix letter, we had
15 discussed this at the pretrial conference, and the Court at
16 that particular point in time did address the issue of these
17 additional letters. And the Court reserved judgment on the
18 issue but did signify that if these were part to show a
19 campaign by PilePro with respect to protecting its patents,
20 then it could be admissible on that basis.

21 THE COURT: Are you offering the Parametrix letter?

22 MR. RAMOS: Your Honor, at this point in time, we
23 don't know what the testimony will hold or what the case in
24 chief is with respect to that.

25 THE COURT: Can you address Mr. Restagno's point that

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1 in the absence of context, the jury won't have any idea what
2 letter this testimony is even referring to.

3 MR. RAMOS: Well, in our case in chief, your Honor,
4 Mr. Wendt will describe the background related to the letters
5 that were going out by PilePro.

6 THE COURT: That's not my concern, and Mr. Wendt may
7 well be permitted to do that. But if Mr. McShane's testimony
8 is played to the jury and there's a discussion of this letter
9 being signed by him, not Mr. Mitchell, and a description and a
10 discussion about what's in the letter but no context or
11 explanation of what letter is even being discussed, let alone
12 shown to the jury, how are they to understand the relevance of
13 this, and how is that not going to confuse them?

14 MR. RAMOS: I believe that the designation did
15 specifically address identifying Exhibit 34 and that this was
16 the letter that was sent by you to Parametrix. So it's not
17 that it would be a confusing issue for the jury to understand
18 that there was another letter sent to another entity by PilePro
19 and that that one was part of their campaign of protecting what
20 they in good faith believed was their rights to the '543
21 patent.

22 THE COURT: All right. That portion of the testimony
23 is not actually designated.

24 MR. RAMOS: But it leads -- but it's actually
25 mentioned in 104, lines 14 and 15:

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1 Did Robert receive the letter to Parametrix?

2 I'm sure he did.

3 Do you recall?

4 Well, I recall some circulation. In fact, I think I
5 did. I don't know if he did or did not, right sitting here. I
6 don't know without being able to check.

7 So that Parametrix is specifically identified in that
8 letter is relevant to the letter-writing campaign that PilePro
9 had undertaken.

10 THE COURT: How does the discussion of the content of
11 this letter, how is that relevant to the claims that are
12 actually being tried?

13 MR. RAMOS: Well, it's going -- it's describing that
14 this letter was not being sent out in a vacuum or that PilePro
15 had some intent to harm Skyline willy-nilly. It said it
16 occurred as a result of their counsel, Doug Mitchell, approving
17 changes to the letter.

18 THE COURT: But I think that does run afoul of what I
19 said the other day, which is that you can't introduce evidence
20 of other letters to suggest that other letters were sent in
21 good faith. Whether the other letters were sent in good faith
22 or not is not relevant to the good faith, lack thereof, or
23 damages with respect to the Madonna letter.

24 I said to the extent that there was limited testimony
25 concerning the fact that this was part of a larger, you know,

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1 campaign, that that would be one thing. But you can't
2 essentially introduce good conduct as an effort to rebut their
3 allegations with respect to bad conduct.

4 So, Ms. Ghavimi, you can say what you want to say, but
5 I'm about to sustain the objection. Go ahead.

6 MS. GHAVIMI: Your Honor, they're introducing the fact
7 that Boies, Schiller refused to sign the letter as evidence of
8 bad faith, and so I think it's only in fairness that we can
9 highlight this section to say -- we're not using it to
10 establish good faith of this letter. We're using it to say
11 that the lawyer reviewed the letter, and it was sent out.

12 THE COURT: Mr. Restagno.

13 MR. RESTAGNO: Your Honor, there's a bit of sleight of
14 hand going on here. What I think counsel for PilePro is saying
15 is that we are offering evidence of PilePro's counsel's refusal
16 to sign the Madonna letter as evidence of bad faith regarding
17 the Madonna letter. That's completely apart from your Honor's
18 ruling last week, which is that a lawyer's opinion of a letter
19 that's not the Madonna letter has no bearing on the good or bad
20 faith attendant to the Madonna letter.

21 MS. GHAVIMI: I would disagree, your Honor, when it's
22 the same lawyer and this same letter with minor changes in the
23 wording. And the emphasis is going to be on the fact that that
24 lawyer did not have -- that my client did not have an
25 infringement, official infringement opinion, and that that

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1 lawyer refused to -- it's a slide in their opening argument
2 that that lawyer refused to sign the Madonna letter. I think
3 that it's only equitable that we can introduce testimony from
4 somebody other than our client who states that this letter was
5 reviewed, and it was approved by Mr. Mitchell.

6 THE COURT: I would certainly agree as to the Madonna
7 letter. Is there testimony from Mr. Mitchell, or otherwise,
8 with respect to why he didn't sign the Madonna letter?

9 MS. GHAVIMI: There is, but there's -- but I don't
10 think that your Honor's order in the pretrial conference
11 preventing evidence about -- your order in good faith of the
12 other letters excludes altogether all testimony about
13 Mr. Mitchell's opinions on the other letters and whether he
14 reviewed them or not and the process by which the campaign of
15 letters was sent out, especially considering the fact that --

16 THE COURT: But my question is what's the nexus
17 between Mr. Mitchell's decision not to sign this letter and
18 discussions he may have had concerning this letter and the
19 Madonna letter, which is what the claim in this case relates
20 to?

21 MS. GHAVIMI: Because all of those letters were sent
22 out contemporaneously in time. The discussions about sending
23 letters all are involved in all of the same evidence and
24 exhibits. There are many e-mails. Conversations all occurred
25 about the same topic, whether to send a letter or not, who to

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1 send them to. Mr. McShane discusses that. He decided it
2 didn't matter. In this section he decided that it was -- he
3 was to send the letter to Parametrix, but it didn't matter.

4 The jury's going -- the different individuals signed
5 the letter. Skyline has another slide in their opening
6 argument that Mr. Wendt signed the letter to Madonna. Well,
7 also what's going to come into evidence is the letter to
8 Skyline. Your Honor, from what I understand, correct me if I'm
9 wrong, said that that was permissible evidence because the two
10 were connected, indisputably connected. That letter was signed
11 by Mr. Mitchell; and, therefore --

12 THE COURT: To Skyline?

13 MS. GHAVIMI: To Skyline.

14 THE COURT: To Skyline? I don't recall any discussion
15 of a letter to Skyline.

16 MS. GHAVIMI: There was an infringement warning letter
17 to Skyline signed by Doug Mitchell from Boies, Schiller on
18 October 23, 2014, and then there was a November 1 letter sent
19 to John Madonna that was signed by Mr. Wendt.

20 THE COURT: Okay.

21 MS. GHAVIMI: And the witnesses discussed both of them
22 inextricably, and Mr. Bandini mentioned during the pretrial
23 conference that it may be impossible to separate the testimony
24 of the two.

25 THE COURT: I think, if I remember correctly --

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1 Mr. Bandini can correct me -- I thought he was referring to a
2 letter that was sent, if I remember correctly, to the Army
3 Corps of Engineers or some other entity involved in the Madonna
4 project.

5 MR. BANDINI: That's correct, your Honor. That was
6 the U.S. Army Corps of Engineers letter relating to the Madonna
7 project.

8 THE COURT: I don't think those two are --

9 MS. GHAVIMI: Okay. Then that was my mistake. But in
10 Mr. Mitchell's testimony, which I don't know yet if Skyline
11 intends to offer in chief. They have not told us. They've --

12 THE COURT: He's certainly on the joint pretrial
13 order.

14 MS. GHAVIMI: I know, but they have dropped some of
15 their deposition testimony that they -- that was on the
16 pretrial order, so it's possible.

17 However, in some of that testimony he talks about
18 other letters and the decision surrounding whether to send the
19 letters and the campaign of sending the letters and whether he
20 reviewed it, and it certainly goes to the decision to place the
21 infringement warning up on the Web site and what Mr. Wendt
22 understood in terms of discussions with his attorneys. And
23 Mr. McShane was an integral part of those discussions. He
24 participated in them at the time.

25 THE COURT: And I have no doubt that if you -- if

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1 there were testimony from Mr. McShane regarding Mr. Mitchell's
2 decision not to sign the Madonna letter, that that would
3 obviously be directly relevant and presumably admissible. My
4 question is what bearing does this have on the lawyer's
5 decision not to sign the Madonna letter?

6 MS. GHAVIMI: Because he's explaining -- we believe
7 that Mr. McShane as a participant in the discussions of the
8 campaign gives context to the decision to send out the letters
9 and the decision as to who reviewed them and why and, in
10 particular, in rebuttal to certain facts that Skyline is going
11 to present regarding the Madonna letter.

12 THE COURT: All right. I think this is a little bit
13 of a close call, but I'm actually going to overrule the
14 objection as long as page 102, lines 21 to 24, is included so
15 that it's clear what letter is being discussed here. I think,
16 given that page 103 does -- the answer says: "If we are going
17 to send these out to a lot of people, it doesn't make any
18 difference who sends them."

19 I think that does have some bearing on who signed and
20 sent the letter with respect to Madonna, and in that regard
21 goes to -- sounds like it may rebut or at least bear on an
22 argument that Skyline is making. So I will overrule that
23 objection, again, as long as the testimony on the prior page
24 framing it and putting it in context is included.

25 Now, I think that covers all of McShane. I know we

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1 still have Maake, a handful of objections that I reserved
2 judgment on. It's now 12:15, so I'm going to defer those until
3 a later break so that you can get your own lunches, so I can
4 get my own lunch, and we can be ready go at 1:00.

5 Anything else that must be raised or discussed before
6 openings? This is your moment.

7 MR. BANDINI: No, your Honor.

8 MR. RAMOS: No, your Honor.

9 THE COURT: Please be back here at five minutes to
10 1:00. If you'd like, you can move the podium to the front of
11 the jury box so that you're directly facing the jury, and at
12 1:00 o'clock we'll bring the jury out and start with openings.
13 Enjoy your lunch.

14 MR. BANDINI: Thank you, your Honor.

15 (Lunch recess)
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A F T E R N O O N S E S S I O N

1:00 p.m.

(Jury not present)

THE COURT: My deputy tells me you have an issue.

What's the issue?

MR. BADINI: Your Honor, earlier this morning after your ruling on the statement of undisputed facts, we asked whether they would sign the stipulation in the form preferred by the court which we had prepared as Plaintiff's Exhibit 585. Counsel informed Ms. Westcott that they would. Coming back from lunch we are now informed by counsel for PilePro that none of them have authority to sign such a stipulation.

I don't know why, given how smoothly everything has gone in this case, but we expected a possible problem, so we prepared an alternative version which we shared with counsel I think at the pretrial conference, which does not have the caption and the signature page, but the court may simply tell the jury that it's stipulated to. So, I don't know how your Honor wants to proceed. We can use the alternative version which is marked as Exhibit 584, or we can inquire as to why they will not sign the exhibit.

THE COURT: Mr. Ramos, explain to me how on earth counsel cannot have authority to sign a stipulation in a legal proceeding in federal court.

MR. RAMOS: Because, your Honor, there is a clear --

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1 and I'm stating it for the record -- a clear factual error.

2 THE COURT: I don't want you to restate for the
3 record. Last Wednesday you had an opportunity to raise these
4 issues, and you yourself sitting in that chair over there said
5 you had no objection to introduction of this joint stipulation,
6 a stipulation that you entered over two months ago --

7 MR. RAMOS: Your Honor --

8 THE COURT: Hold on. Mr. Ramos, if I'm speaking, you
9 do not speak. OK? You waived any opportunity to raise an
10 argument. And it was last night at almost 11 p.m. that your
11 cocounsel -- having never appeared in this court before --
12 wrote a letter to me changing your position 100 percent. That
13 is not going to happen, and it's not going to fly, and it's not
14 going to be countenanced in this court. All right?

15 So you can either sign it, because you are counsel in
16 this case and have authority to sign it, and you are stuck with
17 those stipulations, and I don't care if they are true or not at
18 this point, or I will admit the one that is not signed by you.
19 It is your choice.

20 MR. RAMOS: I'm not going to sign it, your Honor.

21 THE COURT: Good. Then the other one will be
22 admitted. Let's get the jury.

23 To be clear, I will also instruct the jury that these
24 are joint stipulations of the parties, that both sides have
25 agreed to them, and they are to treat those facts as true.

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Opening - Ms. Westcott

1 (Jury present)

2 THE COURT: Welcome back. I hope you had a pleasant
3 break and a pleasant lunch. As I mentioned before we left, the
4 first stage of the trial is the opening statements by the
5 lawyers. As I mentioned, this is their opportunity to tell you
6 what they expect the evidence in this case will be. Their
7 opening statements -- in fact anything they say throughout the
8 trial -- is not actually evidence, but this is just to give you
9 a preview and sort of context for the evidence that you will
10 hear thereafter.

11 We will begin with the plaintiff's opening statement
12 and then proceed to the defendants. Just to give you a sense
13 again, tomorrow we will start our regular schedule of 9 to
14 2:30. Today we are going to go to 5 p.m. and finish a regular
15 day. Then we will take a break at some point this afternoon
16 just to take a break.

17 with that, I would ask you to give your attention to
18 plaintiff's counsel, Ms. Westcott.

19 Ms. Westcott, you may proceed.

20 MS. WESTCOTT: Thank you, your Honor. Good afternoon.
21 My name is Merritt Westcott. I am one of the attorneys for
22 Skyline Steel in this case. With me in the courtroom here
23 today is the president of Skyline Steel, Mr. Laurent DeMey, and
24 my colleagues Mr. Aldo Badini, Mr. Jay Lazar, Mr. Frank
25 Restagno. They also represent Skyline in this case.

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Opening - Ms. Westcott

1 Ladies and gentlemen, this is a case about false
2 accusations and the damage those false accusations caused.
3 Here the false accusations were made by the defendant in this
4 case, PilePro, and against products sold by my client Skyline
5 Steel.

6 Now, the court has already determined that PilePro's
7 accusations were not true, and you will hear how PilePro worked
8 with one of Skyline's biggest competitors, a steel distributor
9 called L.B. Foster, to spread these false accusations and make
10 certain they reached as many potential Skyline customers as
11 possible.

12 What Skyline will show during this trial is that
13 PilePro made these false accusations in bad faith. You will
14 hear that PilePro's own lawyers told it not to make these
15 accusations. Its own lawyers told PilePro there was no basis
16 for making them. But PilePro decided to ignore its lawyers'
17 advice and made them anyway.

18 Before I get to the specifics of the accusations, let
19 me back up and tell you a bit about the parties in this case
20 and the products that they sell.

21 My client, Skyline Steel -- and you should have a
22 slide show up in front of you -- is a United States company;
23 it's headquartered a short distance from here, in Parsippany,
24 New Jersey, and has locations across the United States.
25 PilePro sells construction solutions to contractors, including

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Opening - Ms. Westcott

1 what are called sheet piles and sheet pile walls. You likely
2 pass by sheet piling all the time. Sheet pile walls are
3 sometimes used to hold back dirt when someone is digging a
4 building foundation. They can be used to make retaining walls.
5 In this slide one of Skyline's sheet pile walls is being used
6 to form the wall of an underground parking garage in
7 Hicksville, New York, and here it is being used along the
8 Rockaway MTA rail line. Here it is being used as a retaining
9 wall alongside a waterway. If you zoom in, you can see that
10 these walls are made of shaped steel sheets that connect
11 together. The ends of these sheet piles are especially shaped
12 so they can connect with each other. These shaped ends are
13 sometimes called interlocks.

14 In some cases where more stability or strength is
15 needed, I-shaped beams, called king piles or large pipes, are
16 also used in the wall and are driven far into the ground along
17 with the sheet piles. In those cases, when the I beams or
18 pipes are used, the wall is commonly referred to as a combi
19 wall because it combines sheet piles with these other products.
20 Here is a picture of a combi wall that includes round pipes and
21 sheet piles. And here is an example of a combi wall that
22 combines the I beams called king piles with sheet piles to
23 increase stability.

24 Sometimes separate connector products are used in
25 these combi wall to connect these different pieces together.

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Opening - Ms. Westcott

1 The products at issue in this case are the ones you just saw.
2 Those that make up Skyline's combi wall called the HZM system.

3 Skyline sells all of these types of products and is
4 indirectly owned by another U.S. company called Nucor. Nucor
5 makes many different steel products at its steel mills that are
6 located throughout the U.S. by turning scrap metal mostly from
7 scrap automobiles into new steel products. You will hear from
8 Skyline's president, Mr. DeMey, who is also a Nucor executive,
9 that Skyline sells the sheet piling made by Nucor and it also
10 sells sheet piling products made by a company in Europe called
11 ArcelorMittal. My client Skyline Steel is the plaintiff in
12 this case.

13 The defendant in this case is PilePro LLC, which is
14 headquartered in Texas. PilePro LLC is a patent holding
15 company, meaning it is a company that owns patents but it does
16 not make or sell any products. PilePro LLC is a group of
17 companies run by Mr. Roberto Wendt, sometimes referred to as
18 the PilePro group. One of the PilePro companies sells steel
19 connectors, as you will see on this slide here, and these
20 connectors are used to connect sheet pile walls together.
21 PilePro's connectors are used with a variety of sheet pile
22 products, including the sheet pile products sold by Skyline's
23 competitors.

24 Now, all of the lawyers in this case I'm sure
25 appreciate the time and the effort you are going to spend here.

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Opening - Ms. Westcott

1 In that regard I wanted to let you know that there is some good
2 news, and the good news is this: A number of things in this
3 case have already been decided either because they have been
4 agreed to by the parties, or because they have already been
5 decided by the court.

6 Skyline and PilePro have put together a list,
7 something called the joint undisputed statements of law and
8 fact. This list contains things that Skyline and PilePro have
9 agreed to or that the court has already decided, so you don't
10 have to decide the things on this list. The parties have
11 marked this list as Plaintiff's Exhibit 584, and you will get a
12 copy of this list to take back with you to the jury room and to
13 review at the end of the trial.

14 As I speak to you this morning, and throughout the
15 course of this trial, you may see slides that look like this
16 where we present one of these undisputed statements of law and
17 fact. So, why am I showing you these facts? Because even
18 though you don't have to decide the facts that will show up on
19 this screen, these facts are important to the issues that you
20 will have to decide in this case.

21 Now on to the specifics of this case. As I said, this
22 is a case about false accusations and statements that PilePro
23 made about Skyline's products. The first false accusation that
24 Skyline would like you to focus on involves a letter that
25 PilePro sent to one of Skyline's customers, a construction

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Opening - Ms. Westcott

1 contractor named Madonna Construction. In order to explain
2 that letter better, however, I have to give you some
3 background.

4 Several years ago, in October of 2013, PilePro
5 obtained a U.S. patent. This is a copy of the front page of
6 that patent. As you can see, the patent number there at the
7 top right 8,556,543(b)(2). For purposes of this case though it
8 will mostly be called by its last three digits, the '543
9 patent.

10 Right below the patent number you will see the date
11 that the patent issued: October 15, 2013. The issue date is
12 the date the patent becomes effective. PilePro's patent covers
13 a method or a process of making a sheet pile component.

14 So, PilePro got this patent on October 15, 2013, and
15 you will hear that only days later PilePro started sending
16 letters to Skyline's customers accusing those customers of
17 infringing this patent if they bought or used Skyline's
18 products called the HZM system. I will tell you a bit more
19 about the HZM products in a moment, but one important point
20 here is that the evidence will show that PilePro sent these
21 letters accusing Skyline's products of infringement without any
22 legal opinion that they actually infringed.

23 You will learn from PilePro's former in-house lawyer
24 as general counsel, Mr. Dwight Williams, that about two weeks
25 after PilePro got this patent, it heard that an order of HZM

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Opening - Ms. Westcott

1 products was being delivered to Mr. Madonna of Madonna
2 Construction in California. Madonna had already ordered the
3 HZM products from Skyline, and the evidence will show that
4 PilePro knew it. In fact, PilePro knew it because it found out
5 about it from one of Skyline's biggest competitors L.B. Foster.
6 You will hear that L.B. Foster sells a combi wall that directly
7 competes with the HZM system and that combi wall uses PilePro's
8 connectors.

9 You will hear that PilePro knew that Madonna was
10 considering both the L.B. Foster product and Skyline's product
11 for his project. So, PilePro wanted to send a letter to
12 Madonna accusing the HZM system of infringement. You will hear
13 the videotaped testimony of PilePro's own lawyer Doug Mitchell
14 who works at a lawyer firm called Boies Schiller. Mr. Mitchell
15 will tell you that he is not a patent attorney, that he had not
16 even looked into whether Skyline's HZM products infringed when
17 PilePro wanted to send these letters, and he will tell you that
18 no one else at his firm had looked at it either.

19 Mr. Mitchell, PilePro's lawyer from Boies Schiller,
20 will tell you that his firm refused to sign a letter accusing
21 Madonna of infringement. Joint undisputed statement of fact
22 154, Boies Schiller refused to sign the infringement accusation
23 letter sent to John Madonna Construction Company dated November
24 1, 2013.

25 So, when PilePro's lawyers refused to sign this letter

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Opening - Ms. Westcott

1 to Madonna, what did PilePro do? Instead of listening to its
2 lawyers' advice, Mr. Wendt, who is the head of PilePro, put the
3 letter on his own letterhead and sent it anyway. And what did
4 Mr. Wendt's letter say? Here is Mr. Wendt's letter. You can
5 see it's on PilePro's letterhead to Madonna Construction,
6 signed by Mr. Wendt. And PilePro's letter accused Madonna and
7 Skyline of infringement, in other words of selling and using a
8 product made by the patented method. PilePro threatened to
9 hold Mr. Madonna liable for using the system. But PilePro told
10 Mr. Madonna that he could avoid this legal problem if he would
11 have just instead buy the combi wall that included PilePro's
12 connectors.

13 You will learn that Mr. Madonna was very upset about
14 receiving this letter and that he contacted Skyline asking
15 Skyline to take care of this problem. He wanted Skyline to
16 protect him from any lawsuit by PilePro, in other words to
17 indemnify him, and he also wanted Skyline to pay his legal
18 fees.

19 Now, here is something that the court has already
20 determined in this case. The court has already determined that
21 when PilePro sent the letter to Madonna on November 1, 2013,
22 accusing Madonna of infringing the '543 patent by virtue of its
23 use of the HZM system, PilePro acted in bad faith, both
24 objectively and subjectively.

25 The court has already found that the letter sent to

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Opening - Ms. Westcott

1 Madonna was sent in bad faith. That is an undisputed statement
2 of law and fact, and you will not be asked to decide that.
3 With regard to this letter to Madonna, you will only be asked
4 to decide if Skyline was damaged and, if so, how much.

5 Skyline believes that the evidence in this trial will
6 show that it was damaged by this letter, that it did agree to
7 indemnify Madonna, and that it did pay Mr. Madonna's legal
8 fees.

9 So, I have been talking about an infringement warning
10 letter that PilePro sent to Mr. Madonna, and I would like to
11 shift gears to talk about accusations and statements that
12 PilePro made on its website.

13 You will hear that PilePro created a website so that
14 engineers designing construction products with sheet piling
15 could look at and could compare a variety of products from
16 different companies, including Skyline's products. This
17 website is still up today, and it's called isheetpile.com. In
18 fact, you will get to see screenshots from this website during
19 the trial.

20 This case also involves false accusations and
21 misleading statements that PilePro made on this website about
22 Skyline's products.

23 First, similar to its letter to Madonna, PilePro
24 posted an accusation on its website that Skyline's HZM products
25 infringed the patent. You will hear that about a week after

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Opening - Ms. Westcott

1 PilePro sent the letter to Madonna, it also decided to post an
2 infringement accusation on every page of the website that
3 showed a product used in the HZM system. Here is what the
4 accusation said. "Warning: This product infringes a U.S.
5 patent owned by PilePro LLC. Click here to view the patent.
6 If you would like more details and to use this patented system,
7 please e-mail info at PilePro.com or call 866-666-7483."

8 In order for you to understand why Skyline believes
9 that this accusation was false and was made in bad faith, I
10 will have to tell you a bit more as promised about Skyline's
11 HZM system products and PilePro's patent.

12 As I said, this is a picture of the HZM system as
13 installed. Mr. DeMey, Skyline's president, will explain the
14 system to you in more detail, but as you can see here the
15 system is made of three different products. There are I-shaped
16 king piles shown here in blue. There are sheet piles called AZ
17 sheet piles shown here in green, and there are connectors that
18 connect the two shown, here in yellow. Skyline buys these
19 products from their manufacturer, a company called
20 ArcelorMittal.

21 Now, in addition to those three products being sold
22 together as the HZM system, each of these three components can
23 be sold separately. For example, the AZ piles are mostly sold
24 by Skyline to make AZ pile walls. This is a picture of an AZ
25 pile wall. You will note it doesn't include the king piles or

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Opening - Ms. Westcott

1 the connectors. If a contractor just wants an AZ pile wall, it
2 doesn't need to buy the other two products. Skyline has been
3 selling the three products of the HZM system together branded
4 as HZM since 2009, but the AZ piles and connectors have been
5 sold by Skyline since the early 2000s.

6 The infringement accusation that I just read to you,
7 the one that said "Warning this product infringes a U.S. patent
8 owned by PilePro," it was posted on every web page that
9 displayed any product which was a component of the HZM system,
10 including the AZ intermediary pile products and the connector
11 products.

12 PilePro admits that the website accused the king piles
13 of the HZM system of infringing. PilePro admits that the
14 website accused the AZ intermediary piles of infringing. And
15 PilePro admits that the website accused the HZM connector
16 products of infringing.

17 Now, Mr. Mitchell, the Boies Schiller lawyer who
18 refused to sign the Madonna letter, he also did not agree with
19 PilePro posting this infringement accusation on the website.
20 You will hear Mr. Mitchell testify that he clearly told PilePro
21 not to post that warning. His firm told PilePro don't do it.
22 In fact, both of PilePro's attorneys, Mr. Mitchell and
23 Mr. Williams, the in-house attorney, will testify that when
24 PilePro decided to post this warning Mr. Mitchell's firm hadn't
25 even begun to investigate whether or not there was any

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Opening - Ms. Westcott

1 infringement.

2 So, given that advice from his attorneys, what did
3 PilePro do? Posted the warning anyway. Mr. Wendt, the head of
4 PilePro, posted the warning on the website, and that warning
5 stayed posted for more than two months, and on every page that
6 showed any Skyline product used in the HZM system, and it even
7 stayed posted after Skyline brought this lawsuit.

8 So, the evidence will show that PilePro ignored its
9 lawyers' advice not once but twice: First, about sending the
10 Madonna letter; second, about posting this infringement warning
11 on the website.

12 But PilePro didn't just post the warning and leave it
13 at that. You will hear that PilePro told L.B. Foster, one of
14 Skyline's biggest competitors, about the infringement
15 accusation on the website, and L.B. Foster employees will
16 testify that they told numerous potential customers of
17 Skyline's about this accusation, and they would tell them about
18 PilePro's patent. You will hear about how PilePro and L.B.
19 Foster worked together to spread the news of this infringement
20 accusation throughout the industry.

21 Now, one thing we do know about the accusation against
22 the HZM products is that the accusation was false. Let me
23 repeat that because it's important. PilePro's infringement
24 accusations against the HZM system products was false. This
25 court has already determined that none of the HZM system

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Opening - Ms. Westcott

1 products infringe the '543 patent. The king piles do not
2 infringe. The AZ intermediary piles do not infringe, and the
3 connectors do not infringe. Therefore, you don't need to
4 determine whether or not PilePro's infringement accusations
5 were true or false. They were false.

6 What you do need to determine, however, is whether
7 PilePro posted these accusations on the website in bad faith.
8 We will show that it did.

9 First, as I already explained, these were posted
10 against the clear advice of their attorneys and before any
11 analysis of infringement had been completed. But not only
12 that, the evidence will show that PilePro knew when it made the
13 accusations that the AZ piles and connectors could not possibly
14 infringe its patent. In other words, PilePro not only was
15 wrong about infringement; it knew that some of the products
16 couldn't infringe. Why do I say that? Let's take a closer
17 look at the patent in this case.

18 This is the claim of PilePro's patent. I know there
19 are lots of words on this screen, and you will be able to take
20 this claim back to the jury room with you and read it, but I
21 just want to point out two things.

22 First, this is a patent that covers a method of
23 manufacturing a sheet pile wall component. OK? And this
24 method requires a step of shape-cutting the component. And
25 specifically it requires that the interlock -- you recall the

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Opening - Ms. Westcott

1 slide with the two hands that connected the sheet piles
2 together -- it requires that the interlock be shape cut. I
3 don't think you will hear any disagreement that the patent
4 requires that during this trial.

5 So, the problem is that it is undisputed that the AZ
6 piles and the connectors were not made by shape-cutting. As
7 Mr. DeMey will explain, the interlocks of those two components
8 were manufactured by a hot rolling process and had been for
9 years before PilePro got this patent. And significantly you
10 don't even have to take Skyline's view for it. PilePro agrees.

11 It was common knowledge in the industry that the AZ
12 intermediary pile products are made by hot rolling, and it is
13 common knowledge in the industry that the connector products
14 used with the HZM system are made with hot rolling.

15 So, PilePro posted its accusations on the website
16 pages, and the pages that include the AZ piles and connectors,
17 knowing that these products weren't shape cut as required by
18 the patent.

19 Skyline believes that because PilePro knew its
20 allegations were false, and because it posted the accusation
21 against the advice of its own attorneys, and with no opinion
22 that any of the three products infringed, these accusations
23 were posted in bad faith.

24 Skyline will also show during these trials that these
25 accusations -- which were posted on the website for engineers

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Opening - Ms. Westcott

1 and customers to see -- hurt Skyline's business. You recall
2 this website is designed for engineers who are looking to
3 compare and to select sheet piling products for upcoming
4 construction projects. You will hear that at the time PilePro
5 posted this accusation its website was getting thousands of
6 hits per month.

7 Mr. David Persampieri, who will appear in the
8 courtroom, and is an expert in the steel industry, will offer
9 an opinion about how this website infringement accusation
10 affected the user's choice of products shown on the website and
11 how it cost Skyline over a million dollars in profits and lost
12 business.

13 Recall I told you this case dealt with several false
14 or misleading statements on PilePro's website. The
15 infringement accusation I told you about was one, but there are
16 two more that Skyline will show during this trial were
17 misleading to users.

18 One will be referred to as the lead times, and the
19 other as the request-a-quote feature.

20 You will hear that in the construction business the
21 amount of time it takes between ordering a product and when it
22 gets delivered to the job site is an important factor, and it
23 affects the product selection for a job. Now, keeping that in
24 mind, PilePro's website posted supposed lead times for delivery
25 times for the products that it displays, including Skyline's

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Opening - Ms. Westcott

1 products.

2 Mr. Wendt from PilePro determines what lead times will
3 be posted, and the evidence will show that the lead times
4 posted for Skyline's products are artificially inflated, in
5 other words are made to appear longer than they actually are.
6 Because of this, Skyline has asked PilePro to take the lead
7 times for Skyline's products off its website, but PilePro has
8 refused.

9 The second website feature you will hear about is
10 something called request-a-quote. Request-a-quote is a button
11 on PilePro's website, and it appears next to Skyline's products
12 on the website. It appears on this button -- which is labeled
13 Request a Quote -- that the user can push the button and
14 request a quote or a price for Skyline's product through the
15 website. But when the user pushes this button, he or she does
16 not get a quote or a price for Skyline's products, and in fact
17 PilePro has never had the authority to sell any of Skyline's
18 products.

19 So, what happens when the user pushes the Request a
20 Quote button? You will hear on video testimony one of
21 PilePro's former employees, Mr. Gerry McShane, who was in
22 charge of the website. He will testify that when someone used
23 this button, that request came to him at PilePro, and that he
24 was instructed by Mr. Wendt to talk them out of using a Skyline
25 product and into using a competitor product. Actually, he will

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1 testify that he would tell them that the Skyline product was
2 not available and that he would try interesting them in
3 something else.

4 Mr. McShane will testify that he thought this Request
5 a Quote feature was a bait and switch to the users of the
6 website, because the user thought they were going to get
7 pricing or information about a Skyline product, and instead
8 they got steered into buying products from other companies
9 including PilePro. Mr. McShane will tell you he had many
10 disagreements with Mr. Wendt about this feature on the website.

11 Skyline believes that these two features of the
12 website -- the lead times postings and the Request a Quote
13 feature -- are false or misleading to website users. And
14 Skyline wants PilePro to stop listing its lead times and to
15 stop using their Request a Quote feature with Skyline's
16 products.

17 Over the next few days you will hear from a variety of
18 witnesses, both by live testimony and on video, and you will
19 see a lot of documents. You will hear from Skyline's
20 president, Mr. DeMey. You will also see and hear from its
21 chief financial officer, Ms. Gorog. And you will hear video
22 testimony from one of Skyline's customers, Mr. Madonna, who got
23 the infringement letter from PilePro. You will also hear from
24 Mr. Wendt of PilePro, PilePro's former attorneys Mr. Williams
25 and Mr. Mitchell, and PilePro's former employee Mr. McShane.

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Opening - Mr. Ramos

1 You will also hear from two employers of L.B. Foster, Skyline's
2 competitor, Mr. Wheeler and Mr. Whitworth.

3 Once you have heard all the testimony, and seen all
4 the documents, we believe that all of this evidence will show,
5 first, that Skyline was damaged when PilePro sent the
6 infringement letter to Madonna in bad faith; two, that
7 PilePro's false infringement accusations against each of the
8 products of the HZM system on its website were made in bad
9 faith because PilePro knew they were false and because it acted
10 directly contrary to the advice of its own lawyers; and, third,
11 we believe the evidence will show that the lead times PilePro
12 posts for Skyline's products are false and misleading, and that
13 the Request a Quote feature misleads users into believing that
14 PilePro's website is a source for Skyline's products.

15 At the end of all of this evidence we believe one
16 thing will be clear: PilePro, controlled by Mr. Wendt, made
17 false accusations against Skyline's products in bad faith and
18 used its isheetpile website to mislead users, steering them
19 away from buying Skyline's products while promoting its own.
20 Skyline sincerely thanks you in advance for your attention and
21 your service, and submits that at the end of all of this
22 evidence, a verdict in Skyline's favor will be appropriate.
23 Thank you very much.

24 THE COURT: Thank you, Ms. Westcott.

25 All right, ladies and gentlemen, I would ask you to

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Opening - Mr. Ramos

1 give your attention now to defense counsel for the defendant's
2 opening.

3 MR. RAMOS: Thank you, your Honor.

4 May it please the court. Good afternoon, ladies and
5 gentlemen of the jury. My name is Julio Ramos. I am an
6 attorney for PilePro, the defendant in this action. Over on
7 this table, the defense table, we have Mr. Robert Wendt, the
8 managing partner of PilePro, who is here and will be here
9 during the duration of the trial. We also have Andy Brown,
10 cocounsel in this matter, Darlene Ghavimi, also cocounsel in
11 this matter.

12 Ladies and gentlemen, this case I feel is very much
13 like a sporting event, a boxing match, so to speak. You have
14 the champ in one corner, Skyline, very well established
15 company, reputable, important to the economy of this nation;
16 it's involved in the steel industry. It impacts our lives
17 daily. Everything that we feel basically is part of the steel
18 process, from automobiles to where we live. It's an important
19 industry. PilePro, it's a 21st century company. It has
20 entered the steel industry in its own unique way. The facts
21 here will show that it has a website, and on this website the
22 consumer of these steel products can access information that
23 relates to the projects and project building, as explained by
24 opposing counsel, all over this country: Damns, bridges,
25 public works projects of all shapes and sizes.

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Opening - Mr. Ramos

1 Now, PilePro, they are involved in a little segment of
2 that called the connector business in large measure. They
3 produce connectors. They fabricate connectors, and they do
4 that domestically here in the United States. Their
5 headquarters are in Austin, Texas. Mr. Wendt is the primary
6 person responsible for the management of the company. Now, he
7 is not the only person there. He has other persons that he has
8 delegated various tasks and functions to. And you will hear
9 from some of them during the course of this case. But the real
10 issue here -- and I believe that it's fundamental, and the
11 evidence will show -- is there are no damages. The evidence in
12 this case with respect to damages is minimal. I would say
13 absent. I would say it doesn't exist in this case.

14 For instance, as opposing counsel stated, false
15 accusations. False accusations. The court has already decided
16 the issues against us, but the court did not decide the issue
17 of damages. And you have that responsibility to determine that
18 issue about damages.

19 Now, in this case the evidence will show that the
20 damages amount, or at least alleged by Skyline, is no more than
21 \$5,000 with respect to that Madonna letter that was so
22 prominently displayed in the opening by the plaintiff. And
23 what happened there was that Skyline agreed that it would pay
24 the attorney fees for this particular vendor in the event it
25 was sued in this case. And they had so-called an

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Opening - Mr. Ramos

1 indemnification agreement to that effect, which from all
2 evidence was only signed by one party: Skyline. Mr. Madonna
3 never signed that letter, that indemnification agreement. He
4 never did. In fact, when he was supposedly paid for his
5 attorney fees, there was no issue there, because the contractor
6 had already paid all the costs due on the project. And after
7 that payment had been made is when Skyline made the payment
8 allegedly of a little less than \$5,000 to the attorney for
9 Mr. Madonna and the John Madonna Construction Company.

10 Now, we argue -- and I think the evidence will show --
11 clearly that those payments were in relation to other disputes,
12 that is to say, other problems that Mr. Madonna had with
13 Skyline. Because the project that we're talking about, and the
14 specifics in this case relate to a project in California
15 sponsored by the U.S. Army Corps of Engineers. And that's a
16 public process; that's a taxpayer-paying process. That's a
17 process that provides important public benefit to the
18 community.

19 So, Mr. Madonna had problems with that and wrote
20 e-mails to Skyline saying, you know what, I have a problem with
21 X, and I have a problem with Y and, you know what, I have a
22 problem with these attorney fees because I received this letter
23 from PilePro and I am afraid, or so he says. But the truth of
24 the matter is, ladies and gentlemen, that those \$5,000 -- a
25 little less than \$5,000 that were paid for attorney fees --

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Opening - Mr. Ramos

1 were not a problem associated with the letter from PilePro to
2 the John Madonna Construction Company. They're not. They're
3 not. Those are peripheral. Other issues were in play, and we
4 will show you that evidence.

5 So I should say, when the plaintiff says false
6 accusations, the accusations in this particular case with
7 respect to John Madonna did not amount to damages to the degree
8 that merits any further consideration with respect to how they,
9 meaning Skyline, presents its case, as it has already in its
10 opening statement said indemnification and attorney fees. But
11 other elements of damages were not discussed because they just
12 simply don't exist in this case.

13 Now turning to the Internet and the website. Maybe go
14 back a little bit and show what PilePro is about. If I can,
15 cocounsel, if you could put on the screen the brochure from
16 2015 of PilePro. We will go briefly into the PilePro group.
17 The first page is the PilePro group. That is a marketing
18 brochure that it has there. As you can see, it has statements,
19 and on page 2 it provides an outline of what the company is and
20 how it portrays itself as an innovator. But I think if we go
21 to page 3, it has a table of contents there, and it shows the
22 products at issue by PilePro and what it does and what it does
23 produce and the contributions it makes to this society.

24 But if we look at page 16 of the brochure, there it
25 specifically identifies the iSheetPile system and the

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1 iSheetPile search tool that is at issue in this case.

2 Now, let's be clear, the court did find bad faith with
3 respect to the sending of the letter to the Madonna contractor.
4 It did. The court has never found the damages. That's for you
5 to decide. Now let's distinguish that Madonna case from what
6 is happening here in the iSheetPile allegation.

7 There has never been determined by this court up to
8 this instance that there was bad faith with respect to the
9 accusations and the print that was placed on the website. The
10 court hasn't done that. So with respect to the iSheetPile
11 website you will make that determination both as to bad faith
12 and as to damages.

13 Now, turning to the iSheetPile website, there is a
14 quick summary that is there on page 16 of the brochure, and it
15 lays out -- and I think it does say in the first paragraph
16 there what the iSheetPile website is. It's a ground breaking
17 on-line tool that compare and configure from hundreds of
18 thousands of sheet pile combinations. That's the first
19 paragraph. That's the essence of what this marketing tool is
20 with respect to PilePro. Skyline doesn't have it. Skyline
21 does not like it. Skyline does not like it because it
22 aggregates, it collects all the information that is publicly
23 available for engineers. We're not talking here about let's
24 call it the retail customer from Old Navy, or Amazon book
25 purchases, or Apple iTunes 99 cent purchases. We're not. Yet

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Opening - Mr. Ramos

1 the reason I raise that is because the expert for Skyline that
2 will testify here in this case, he uses that information to
3 make some of his assumptions. The information I'm referring to
4 is online retail sales from Old Navy, online retail sales from
5 Amazon, Barnes & Noble. He has looked at that, and from that
6 he has made statements with respect to a totally different
7 universe of customer, because one of the things that you are
8 going to have to decide is is the sophistication of the
9 customer base here. And by sophistication I mean engineers are
10 the most highly educated people in this nation -- next to
11 lawyers, of course, and doctors. But engineers, they are a
12 specialized group, a specialized breed of individual, and for
13 that they have training and have accumulated knowledge, which
14 is not the regular par-for-the-course knowledge with respect to
15 assuming things and taking them at face value, which is what
16 Skyline is trying to say, that people may have looked at this,
17 or that people have referenced this tool, or have complained
18 about this tool. That evidence I will go no further in that
19 respect, but I will say that you must look at it with the eyes
20 of what an engineer would bring to the table in analyzing the
21 website. What would an engineer say when they are confronted
22 with an infringement warning?

23 Now, an engineer has a special duty to the public,
24 right? The engineer knows that what he fabricates and what he
25 produces, and what he authorizes impacts potentially millions

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Opening - Mr. Ramos

1 of people, not rarely or randomly but every day. So think
2 about it.

3 So, think about it. Would an engineer take an
4 infringement warning and make his decisions on fundamental
5 works projects based on one, one infringement warning, that the
6 evidence will show was only in existence for 66 days before
7 PilePro took it down? And I wish I could say that the 66 days
8 were in the middle of all the commercial activity available
9 during the 2014 to 2013 and 2015 period, when the expert
10 acknowledges that the infringement warning was up on the
11 website, that it was in the let's say busy season of May
12 through June before school gets out. In fact those warnings,
13 the 66 days of warnings, were in the November, December and
14 January period of time, Thanksgiving, Christmas, New Year's,
15 Martin Luther King Day. All of these days the expert doesn't
16 factor into as what the volume of page views are and how many
17 people looked at this, nor does he differentiate between
18 computer programs that visit websites on a daily basis in order
19 to ascertain the content as any website provider would do.

20 So, what we are facing here in this case are
21 allegations of falsehood on behalf of PilePro, but I must say
22 to say in this case that there were no legal opinions rendered
23 is incorrect, because the evidence will show that Mr. Wendt not
24 only spoke to attorneys here in the United States but spoke to
25 attorneys in Europe as well with respect to this patent, and

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Opening - Mr. Ramos

1 that he spoke to a lot -- when I say a lot, I mean more than
2 three or four. I think we're up to five or six from my last
3 count -- he spoke to attorneys with respect to what he could do
4 legally to preserve his '543 patent.

5 Now, they made a big hay about the fact that an
6 attorney from Boies Schiller refused to sign the letters. In
7 fact he did find some letters, but he gave input continuously
8 with respect to the content of those letters. He looked at
9 them. He blessed those letters, and the evidence will show
10 that based on those communications with their attorney PilePro
11 sent out these letters.

12 So, when we look at this case, this case is a case of
13 innovation versus tradition. This case is about the 21st
14 Century vis-a-vis the early 20th Century with respect to the
15 marketing of products and the utilization of information, how
16 you use that information and how the marketplace reacts to that
17 information.

18 Opposing counsel spoke about a couple of issues, and I
19 do want to address them briefly, and that is with respect to we
20 talked about the infringement accusation on the website, but
21 lead times.

22 Now, lead times, as far as I can gather as a
23 nonengineer, means the date from when an order is placed until
24 it finally gets to its final destination. Now, the evidence
25 will show that there is testimony that lead times at issue in

GBT7SKY4

Opening - Mr. Ramos

1 this case for this particular product, the HZM product, could
2 range from 12 to 16 weeks. In fact, the evidence will show
3 that the contracts that Skyline utilizes to sell the HZM system
4 states specifically that amount of time, up to 16 weeks. It's
5 in their fine print. It is there for everyone to see.

6 Now, they come back and they say, well, the lead times
7 on the website are incorrect. But if I look, we'll show you
8 their products manual from 2013 has multiple references to the
9 PilePro website. They knew that PilePro was making assertions
10 of lead times and making assertions with respect to the quotes
11 necessary to fulfill a purchase order, an order that an
12 engineer may have for a particular project.

13 (Continued on next page)

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GBTHSKY5

Opening - Mr. Ramos

1 MR. RAMOS: Because they had worked together
2 beforehand. They had contracts, and they were such engaged in
3 commerce together that at one point in time preceding these
4 accusations and this case, Skyline had the PilePro Web site
5 address affixed prominently in multiple pages of their catalog.
6 That's true. That's in the evidence.

7 So this case is not about false accusations. This
8 case is about you, the jury, making the findings whether or not
9 Skyline was hurt by what PilePro did. And we will show in this
10 case, with our evidence, with our cross-examination, that there
11 are no damages here and that you will render a verdict in favor
12 of PilePro.

13 Thank you, ladies and gentlemen.

14 THE COURT: Thank you, Mr. Ramos.

15 All right. We will proceed to the evidentiary portion
16 of the case and --

17 MR. BANDINI: Your Honor, may we have a sidebar,
18 please?

19 THE COURT: Not now. We'll take it up at the break.
20 Please call your first witness.

21 MR. BANDINI: Thank you, your Honor. With respect to
22 the evidence, before our first witness, we would like to offer
23 into evidence as Exhibit 584 a document entitled "Joint
24 Undisputed Statements of Fact And law." We have supplied a
25 copy to the other side, and we'd be pleased to hand one up to

GBTHSKY5

De Mey - Direct

1 the Court.

2 THE COURT: All right. Thank you. That document is
3 admitted.

4 (Plaintiff's Exhibit 584 received in evidence)

5 THE COURT: Ladies and gentlemen, a stipulation is
6 sort of a fancy lawyer's term for an agreement between the
7 parties. And the bottom line is these are stipulations, or
8 agreements, between the parties that certain facts or
9 statements are true, and you must regard such agreed facts as
10 true. So Exhibit 584, Plaintiff's Exhibit 584, is in evidence.

11 Please call your first witness.

12 MR. BANDINI: Thank you, your Honor. Skyline Steel
13 calls as its first witness Laurent De Mey.

14 THE DEPUTY CLERK: Please raise your right hand.

15 LAURENT DE MEY,

16 called as a witness by the Plaintiff,

17 having been duly sworn, testified as follows:

18 THE COURT: You may be seated. Start by spelling your
19 name, please.

20 THE WITNESS: My name is Laurent De Mey. Spelled
21 L-a-u-r-e-n-t, De Mey, two words, D-e, M-e-y.

22 DIRECT EXAMINATION

23 BY MR. BANDINI:

24 Q. Good afternoon, Mr. De Mey.

25 A. Good afternoon.

GBTHSKY5

De Mey - Direct

1 Q. Who is your employer?

2 A. My employer is Skyline Steel.

3 Q. I detect somewhat of an accent. It's very important that
4 you speak slowly and clearly so the court reporter here can get
5 everything you say and, most importantly, so the jury can
6 understand everything you say.

7 A. Sure. Yes.

8 Q. Where are you from, Mr. De Mey?

9 A. Yeah, I do have an accent. I'm not from the Deep South.
10 I'm from overseas. I'm from Belgium, born and raised in
11 Belgium, but became an American citizen recently.

12 Q. What is your position at Skyline Steel?

13 A. I'm the president and CEO of the company.

14 Q. CEO meaning?

15 A. Chief executive officer. I'm in charge of the company.

16 Q. I'm sorry?

17 A. I'm in charge of the company.

18 Q. What does Skyline Steel do?

19 A. Skyline Steel sells steel that goes vertically in the
20 ground to support heavy structures. It's called steel
21 foundation parts. So we sell big pipe, big beams, sheet piles,
22 those things you saw on those pictures before. They all go
23 vertically in the ground. They're pushed with big machines to
24 support bridges, highways, high-rise buildings, these kinds of
25 things.

GBTHSKY5

De Mey - Direct

1 Q. We'll get into the details of your business more in just a
2 minute. Can you tell us a little bit about your educational
3 background.

4 A. Yeah. I have a bachelor's degree and a master's degree
5 from the Free University of Brussels in combination with
6 university in Spain as well. So I have a business degree. I'm
7 also a musician. I play a musical instrument. I play the
8 viola, which I both studied in Brussels and in Madrid as well,
9 in Spain. I have a bachelor's degree for that too. And then I
10 kind of studied in several universities afterwards, in business
11 school in Paris, at Duke University, and I'm actually finishing
12 a global executive leadership program at Yale University in
13 Connecticut.

14 Q. Very good. If I may, please try to speak slowly.

15 A. Yeah, yeah, yeah. Okay.

16 Q. What was your first job after your education?

17 A. First started working for a small consultancy firm focused
18 on strategy and overall project management.

19 Q. What did you do after that?

20 A. So one of those projects I worked for the small consultancy
21 firm was actually advising a newly created company which was
22 called Arcelor, and Arcelor was the merger of a number of steel
23 companies back in Europe. And I started working -- after my
24 stint at this consultancy firm, I started working for Arcelor.
25 They hired me.

GBTHSKY5

De Mey - Direct

1 Q. What did you do at Arcelor?

2 A. I worked in the business development function helping to
3 buy companies and build new ventures and open new offices
4 around the world.

5 Q. What relationship, if any, does Arcelor have to this
6 company we've heard about called ArcelorMittal?

7 A. So ArcelorMittal, which was created early in the 2002
8 timing, merged into another company called ArcelorMittal back
9 in 2006. And, yeah, I continued working for Arcelor and then
10 ArcelorMittal over time.

11 Q. Okay. So after the merger, you worked for ArcelorMittal?

12 A. Yeah, I continued working for them. And then, of course,
13 Arcelor became ArcelorMittal, and I stayed on with the company.

14 Q. When did you first come to work for Skyline Steel?

15 A. So ArcelorMittal was the owner of Skyline Steel until four
16 years ago. So, actually, it's ArcelorMittal who sent me over
17 here to work for Skyline.

18 Q. So you were working for Skyline when it was owned by
19 ArcelorMittal?

20 A. Exactly, yes. I came here as being in charge of the
21 operations and running the operations we have, yeah.

22 THE COURT: What year was that?

23 THE WITNESS: It was in 2009. And year and a half
24 later, I became in charge of the company.

25 Q. When you say you came here, what specific geographic --

GBTHSKY5

De Mey - Direct

1 A. Yeah, New Jersey. I live in New Jersey.

2 Q. Is Skyline in New Jersey as well?

3 A. Yeah, we're based in New Jersey. We have operations across
4 the country.

5 THE COURT: Hang on one second. Mr. De Mey, in
6 addition to speaking slowly, make sure you wait for Mr. Bandini
7 to finish his question even if you know or have a sense of what
8 the question is going to be. It makes the court reporter's job
9 very hard unless you wait till he's actually done.

10 THE WITNESS: Understood.

11 THE COURT: Go ahead.

12 Q. What part of New Jersey is Skyline based in?

13 A. In Northern New Jersey, in Morris County.

14 Q. What town?

15 A. Parsippany.

16 Q. And does it have a national presence?

17 A. Yes. We have, as I said, a number of facilities throughout
18 the country. We operate in -- we have ten different facilities
19 throughout the country. We have a number of sales offices as
20 well, 17 sales offices, and then a number of places where we
21 store material throughout the nation to be able to deliver them
22 on a quick notice.

23 Q. Does Skyline produce its own products?

24 A. We don't produce steel. Steel is produced in a very
25 complex, big steel-making facility. We actually process steel.

GBTHSKY5

De Mey - Direct

1 So we will buy steel from big steel mills, whether it's
2 ArcelorMittal or Nucor, another company we heard about today,
3 or some other ones. I would say most of it is domestic steel
4 bought in the U.S. and produced in the United States. We will
5 process that and make it ready for shipment to our customers.

6 Q. So when you went to Skyline at ArcelorMittal's request,
7 what was your position there?

8 A. I was COO, chief operating officer.

9 Q. Did your position change at some point?

10 A. Yes. So January 1, 2011, I became president and CEO, chief
11 executive officer, of the company.

12 Q. As president, what are your current responsibilities,
13 president and CEO?

14 A. Yes, it's still my responsibility, yes.

15 Q. What are they? What are your responsibilities as president
16 and CEO?

17 A. Right. As I said, I run the company, which means I'm in
18 charge of going from human resources to I.T. to sales to
19 operations, finance, the whole -- everything. Strategy.
20 Everything they do.

21 Q. Do you currently have positions with any other company?

22 A. Yes. I'm also vice president within the Nucor Corporation.
23 They are our mother ship.

24 THE COURT: They are what?

25 THE WITNESS: Our mother company. We belong to --

GBTHSKY5

De Mey - Direct

1 Skyline is a subsidiary of Nucor, and I'm a VP at Nucor.

2 Q. Did you say mother ship?

3 A. Yes, I said mother ship. That's the word.

4 Q. Just for the benefit of everybody, how do you spell Nucor?

5 A. N-u-c-o-r.

6 Q. Okay. What does Nucor do?

7 A. Nucor is a steel company. Yeah, steel company.

8 Q. Where is it located?

9 A. It's located, headquarters, in Charlotte, North Carolina.

10 Q. Are you familiar, based on your position with them, as to
11 how it produces steel?

12 A. Yes. Nucor is a company that produces steel in multiple
13 locations in the United States and has introduced multiple
14 decades ago a revolutionary way of making steel converting
15 scrap -- so your old fridge, washing machine, your old car --
16 into steel again and be able to recycle it and make new types
17 of steel. And Nucor makes all types of steels you can imagine
18 based out of scrap that they recycle.

19 Q. Is that the traditional way of making steel?

20 A. No. The old traditional way, which was described before,
21 back 100 years ago was -- and there's still some locations
22 where that is done -- is you take iron ore. You mine locations
23 like Brazil, Australia or the United States or Africa. And you
24 use iron ore, something called coking coal, and you put all
25 this together in a big blast furnace, so make a lot of

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1 pollution, and you make liquid steel from that. The old
2 traditional way is called integrated route. What we do is
3 called the scrap route, which is a more efficient and much less
4 polluting way of making steel.

5 Q. A few questions ago -- or a few answers ago, I should say,
6 you referred to Nucor as the mother ship. What did you mean by
7 that?

8 A. Nucor bought Skyline Steel four years ago, four and a half
9 years ago, in 2012 from ArcelorMittal, and we became a
10 subsidiary of the Nucor Corporation.

11 Q. What kind of steel products does Nucor make?

12 A. So it makes everything from a beam. As soon as you walk
13 outside, you will see some steel somewhere. We probably have a
14 part of that steel. Goes from beam, rebar, flat sheets,
15 everything you can imagine that's used in daily consumption,
16 yeah.

17 Q. Does Nucor and Skyline -- I'm sorry, do Nucor and Skyline
18 sell the same types of products?

19 A. I would say Skyline sells a number of products that Nucor
20 makes, but Nucor makes many more products that Skyline doesn't
21 buy or sell.

22 Q. Are you familiar with the concept of a retaining wall?

23 A. Yes.

24 Q. Does Skyline sell any products that enable customers to
25 make retaining walls?

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1 A. Absolutely.

2 Q. Can you explain to the jury the concept of a retaining wall
3 and have you prepared a demonstrative to aid the jury in
4 understanding that?

5 A. Yeah, I think we have a little drawing we got right here.

6 Q. So we've put on the screen a drawing. Did you -- was this
7 prepared at your direction?

8 A. Yeah, yeah.

9 Q. Can you explain to the jury what this shows.

10 A. Absolutely. So the retaining wall --

11 THE COURT: It's not actually on the jury's screen.

12 MR. BANDINI: Sorry about that.

13 THE COURT: You have to ask to do that. We control
14 who sees it.

15 MR. BANDINI: Your Honor, this is a demonstrative
16 that, my understanding, there's no objection, but they can
17 speak for themselves.

18 THE COURT: They can indeed.

19 MS. GHAVIMI: No objection.

20 THE COURT: It may be published to the jury.

21 MR. BANDINI: I apologize.

22 THE COURT: Ladies and gentlemen, just to be clear, as
23 I understand it, this is not being offered into evidence; is
24 that correct?

25 MR. BANDINI: Not into evidence. It's just a

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1 demonstrative.

2 THE COURT: So this is being offered or used as what
3 is known as a demonstrative exhibit. That is just,
4 essentially, to help you understand the witness' testimony.
5 It's not actually evidence in itself. You should consider it
6 just with respect to the testimony, and hopefully it will help
7 you understand that.

8 Go ahead.

9 MR. BANDINI: Thank you, your Honor.

10 Q. So let me repeat the question, Mr. De Mey. Can you explain
11 to the jury what is shown in this demonstrative that was
12 prepared at your direction.

13 A. Yes. So on the top left corner, you see a gentleman
14 standing next to something that we call the retaining wall. So
15 the dark gray vertical piece there is called a retaining wall
16 because it retains the earth from falling into the water. That
17 is what a retaining wall is.

18 Q. And what have you depicted in the lower left?

19 A. The lower half describes why there could be different types
20 of retaining walls. A retaining wall that only needs to carry
21 the weight of this one gentleman would not be the same type of
22 retaining wall that would be used to carry a full load. When
23 you see the truck and the car standing up there, their weight
24 pushes down to the ground and from pushing down will actually
25 put pressure on the retaining wall and possibly fall over into

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1 the water. So the function of the weight, or the load it's
2 called, the function of the load that this wall is retaining,
3 you will use different combinations or different types of
4 solutions to get the same results, if you like.

5 Q. So in your answer you said there were different types of
6 solutions depending on what type of retaining wall?

7 A. Exactly.

8 Q. Is that what you have depicted on the right side?

9 A. Yes.

10 Q. Hold on, Mr. De Mey. I know the Court will advise you of
11 this if I don't. Please let me finish my question so there's a
12 clean record.

13 Are the different solutions what you've depicted on
14 the right side of the screen?

15 A. Yes, these are different solutions.

16 Q. Please explain those to us.

17 A. So the first one on top you see is called a sheet pile
18 wall. As it continues, wall of sections that we call sheet
19 piles. Once the weight or the load they have to retain from
20 not falling from one side to the other becomes heavier and
21 heavier, you need a bigger and a stronger solution. Those
22 sheet piles have different types of solutions. But once they
23 get out of their reach, you have to add other piles that are
24 stronger. In this case, the second, third are two types of
25 combi walls, the third word on the screen.

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1 Q. When you say combi, that's c-o-m-b-i?

2 A. C-o-m-b-i. Combination wall or combi wall.

3 Q. Thank you.

4 A. One uses a beam as a king pile. It's called the HZM wall.

5 The other one uses a pipe as a king pile. It's called the

6 Pipe-Z combi wall. If the loads are even heavier and even

7 stronger, you could in some cases go to something which is

8 called an O-Pile wall or a pipe pile wall. So the heavier the

9 load or the function of the load, you will use one or the other

10 variation, variations of combination.

11 Q. All right. Thank you, Mr. De Mey. I think we can take

12 that off the screen.

13 So one of the walls on that screen and something you
14 heard about during opening, since you were sitting here, is the
15 HZM system. You heard that term?

16 A. I did.

17 Q. Is that a system that Skyline sells?

18 A. Yes, sir.

19 Q. Can you tell us what it is.

20 A. So as explained before, HZM system is one way of building a
21 retaining wall. And it uses a king pile and special shaped
22 beam, one special type interlock that connects a sheet pile,
23 which is the intermediate piece, to another beam. So you have
24 beam, interlock, sheet pile, interlock, beam, and so forth.

25 Q. Have you also obtained some demonstrative pictures of the

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1 HZM system to help the jury visualize what we're talking about?

2 A. Yes.

3 MR. BANDINI: So I'm putting up D1. With the Court's
4 permission, we would like to display this to the jury.

5 THE COURT: Any objection?

6 MR. RAMOS: No objection, your Honor.

7 THE COURT: All right. You may.

8 BY MR. BANDINI:

9 Q. Mr. De Mey, do you see what we've put up on the screen?

10 A. Yes, what we see here --

11 Q. Hold on. I have to ask you a question. I did ask you a
12 question, I'm sorry, but you answered it.

13 What are we seeing here on the screen?

14 A. We see a sheet pile being driven in the ground with a
15 variable hammer. The green thing on the top is pushing this
16 sheet pile, intermediate piece of steel, into the ground.
17 Between those beams that you see on the right side of the
18 picture, you see some pieces of steel are sticking out already.
19 Those are the king piles. They are already in the ground. And
20 that's done in the first phase. In the second phase, the
21 actual intermediate piece, which is this sheet pile here, is
22 being driven between the sheet, sheet piles.

23 MR. BANDINI: If we can display D2, and I would
24 request that we can show that to the jury as well.

25 THE COURT: Any objection?

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1 MR. RAMOS: I haven't seen it.

2 MS. GHAVIMI: No objection, your Honor.

3 BY MR. BANDINI:

4 Q. Mr. De Mey, what does this picture show?

5 A. This picture shows the same thing except it's finished now.
6 So you see the full combined wall finished, HZM solutions in
7 the ground.

8 Q. Is this wall that we're looking at made out of one large
9 piece of steel?

10 A. No.

11 Q. What is it made out of?

12 A. It's made out of multiple components.

13 Q. Do those multiple components all look the same?

14 A. No.

15 Q. Does Skyline have brochures or manuals that show the
16 different shapes of these components?

17 A. They do.

18 Q. All right. Let me show you what we have premarked as
19 Plaintiff's Exhibit 306 and ask you if you recognize this
20 document.

21 A. I do.

22 Q. What is it, for the record?

23 A. It's our Technical Product Manual, edition 2014.

24 Q. Did Skyline use this document in the regular course of its
25 business?

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1 A. Yes, we do.

2 Q. How is it used?

3 A. It's being distributed to the -- to our customers, to the
4 engineering community, to anybody else who would be involved in
5 any type of construction job that needs foundation material to
6 support any other structure on top of it.

7 MR. BANDINI: At this time plaintiff moves Exhibit 306
8 into evidence and asks that it be displayed to the jury.

9 THE COURT: Any objection?

10 MR. RAMOS: No objection, your Honor.

11 THE COURT: Admitted. You may display it.

12 (Plaintiff's Exhibit 306 received in evidence)

13 MR. BANDINI: Thank you, your Honor.

14 Q. Now that we're looking at 306, I guess the cover page is
15 being displayed to the jury, what is displayed in that big
16 picture in the center of that cover page?

17 A. In the center of the Technical Product Manual you see a
18 picture of a construction pit where you see sheet piles are
19 being used to retain the side walls and have the workers be
20 able to work safely at a level.

21 Q. Take a look at the page with the numbers 5916 at the lower
22 right. Can you tell us what's shown on that page.

23 A. Yes. That's an HZM solution.

24 Q. Is the HZM name a registered trademark?

25 A. Yes, it is.

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1 Q. Do you know who owns that trademark?

2 A. Yes, I do.

3 Q. Who owns that trademark?

4 A. ArcelorMittal.

5 Q. Is Skyline permitted to use that trademark by
6 ArcelorMittal?

7 A. Yes.

8 Q. How do you know that?

9 A. It's part of our contract.

10 Q. Looking at this document, do you know whether there's
11 anything in the document that -- Exhibit 306, that is -- that
12 references the trademark?

13 A. Yes, I know there is.

14 Q. Take a look at the back page. Does the back page of the
15 Technical Product Manual reference the trademark?

16 A. Yes, it does.

17 Q. Can you please read that into the record.

18 A. It says: HZM and AMLoCor are registered trademarks of
19 ArcelorMittal.

20 THE COURT: Can I just ask a quick question. On the
21 very bottom of that page, you can see that it says on the left
22 "confidential," and then on the right there's a letter and
23 number combination that ends in 5964. I assume those were not
24 on the original version of the document; is that correct?

25 THE WITNESS: No, your Honor.

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1 THE COURT: All right. Ladies and gentlemen, let me
2 just explain, you'll see on some documents -- well, you see on
3 this one, and I imagine you'll see on other documents, markings
4 like that. Those are markings that are put on papers, on
5 documents, as part of the litigation process. They're
6 essentially known as Bates stamps. It just allows the parties
7 in a case like this to keep track of documents that have been
8 exchanged and make sure everybody's literally on the same page
9 when it comes to referring to documents.

10 So you'll see that, you. Should basically ignore
11 those markings, as well as the statement that says
12 "confidential." That allows parties to exchange things that,
13 at least in advance of trial, can be kept sort of confidential
14 and just between them. It's just a legal -- part of the
15 process, and you shouldn't consider it with respect to
16 either -- any of the decisions you have to make or hold it
17 against either side.

18 Okay. You may proceed.

19 MR. BANDINI: Thank you, your Honor.

20 Q. When did Skyline start selling the HZM system?

21 A. It's a while ago. Ten --

22 Q. Approximately?

23 A. Ten years ago. Ten, 15 years ago, I think.

24 Q. HZM?

25 A. HZM. As soon as HZM became available, we started selling

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1 it.

2 Q. Okay. Does Skyline have competitors that sell sheet pile
3 walls?

4 A. Yes, sir.

5 Q. Do any of them refer to their walls as HZM walls?

6 A. No, they don't.

7 Q. How about the Skyline name? Are you aware of any other
8 sheet piling company in the U.S. that goes by Skyline?

9 A. No.

10 Q. Now, staying with 306, I believe I wanted to ask you
11 something.

12 Michael, I'm sorry, can you go back to page 5916.

13 When you said that this was the HZM system, I wanted
14 you to take us through the components. Can you explain what
15 those components are.

16 A. Yeah.

17 Q. So now we've highlighted something in blue. What is that?

18 A. The blue is what we call the king pile.

19 Q. Did you say king pile?

20 A. King pile, yes.

21 Q. Okay.

22 THE COURT: Just for the record, the blue is the sort
23 of I-shaped items on the left and the right of the diagram; is
24 that correct?

25 THE WITNESS: Yes.

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1 THE COURT: All right. Go ahead.

2 Q. Now we've highlighted some things in yellow. What are
3 those?

4 A. Those are called connectors. They connect or they make it
5 possible for the sheet pile to connect to that I-shaped beam.

6 Q. Okay. Now let's highlight the next piece. We've
7 highlighted something in green. What is that?

8 A. That's called intermediate sheet pile, or an AZ sheet pile
9 in this case.

10 Q. For the record, what is the shape of what we just
11 highlighted in green?

12 A. This is called an AZ sheet pile. It's produced by
13 ArcelorMittal.

14 Q. And it's sort of a --

15 A. It's like a Z shape, yeah.

16 Q. Now, is the HZM system the first combi wall system that
17 used beams and sheet piles sold by Skyline?

18 A. No.

19 Q. What did you sell before the HZM system?

20 A. Before it was simply called HZ system.

21 Q. So no "M." It was just "H" and "Z"?

22 A. No "M."

23 Q. What is the HZ system?

24 A. It's a very similar product except the beam is slightly
25 different.

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1 Q. When you say "the beam," was that that I-shaped --

2 A. Yeah, I -- we call it the beam. The I-shaped piece of
3 steel was slightly different.

4 Q. All right. Let's put in front of you Plaintiff's
5 Exhibit 308, which is a document. Can you identify it for the
6 record.

7 A. Yes. That's a document which is called HZ Steel Wall
8 System, edition 2000- -- that's not very visible -- I think '3
9 or '1. And it's from a company called Profil ARBED.

10 Q. Was this a document that was used in the ordinary course of
11 business to sell the HZ wall system?

12 A. Yes.

13 MR. BANDINI: At this point plaintiffs would move to
14 admit Exhibit 308 and publish it to the jury.

15 THE COURT: Any objection?

16 MR. RAMOS: Objection, your Honor.

17 THE COURT: Basis?

18 MR. RAMOS: Your Honor --

19 THE COURT: Just one-word basis.

20 MR. RAMOS: Foundation.

21 THE COURT: All right. Sustained.

22 Mr. Bandini, why don't you lay a little bit more of a
23 foundation.

24 BY MR. BANDINI:

25 Q. Mr. De Mey, was this a document that was used by Skyline to

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1 sell the HZ steel wall system?

2 A. Yes.

3 Q. How was it used?

4 A. Same principle. It's used as a document that explains the
5 product solution that's used and distributed to technical
6 people, engineers, customers. Same principle.

7 MR. BANDINI: Same motion, your Honor.

8 THE COURT: Any objection?

9 MR. RAMOS: Same objection. Lacks foundation.

10 THE COURT: Overruled. It's admitted.

11 (Plaintiff's Exhibit 308 received in evidence)

12 MR. BANDINI: Thank you, your Honor. May we publish
13 it to the jury?

14 THE COURT: You may.

15 BY MR. BANDINI:

16 Q. Take a look at the front page, Mr. De Mey.

17 A. Yes.

18 Q. There is a picture and then on top of the picture there's
19 something that looks like a drawing. Do you see that?

20 A. Yep.

21 Q. What does that drawing show?

22 A. It shows a zoomed-in picture of what we described before a
23 little bit with a sheet pile on top, the interlock special
24 shaped steel, and the lower part is a fraction of the king
25 pile, or the I-beam.

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1 Q. Now, do you see at the upper left of the front page it says
2 "edition 2001"?

3 A. I see that, yes.

4 Q. Did Skyline sell this HZ steel wall system in the United
5 States in 2001?

6 A. Yes.

7 Q. Does Skyline still sell that system?

8 A. Not anymore.

9 Q. Why is that?

10 A. Because today it's called the HZM system.

11 Q. Okay. Now, if you stay with that document, let's look at
12 the picture on page 6002 on the bottom -- actually, it's on the
13 center, the right-hand side of the page, which I think is up on
14 the screen now.

15 Can you tell us what that shows.

16 A. It's the same thing. It's -- actually should see it now in
17 the actual product, in steel. On the left-hand side, you see
18 the intermediate sheet pile. The middle strange-shaped element
19 is the interlock, or the connector. And on the right-hand
20 side, you see a part of the king pile, or the I-beam.

21 Q. The king pile, or I-beam, is the part on the right side of
22 the picture; is that right?

23 A. Yes.

24 Q. Is that the part that was different in the HZM system?

25 A. Yes. Yes, that changed.

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1 Q. Now, in the course of your work for Skyline, have you seen
2 any drawings of what the new HZM king pile looks like?

3 A. Yes.

4 Q. All right. Let me show you what we've premarked as
5 Plaintiff's Exhibit 20 and direct you to figure 7 of that
6 document. Can you identify what that drawing depicts.

7 A. That is the -- yes, I can.

8 Q. What does it depict?

9 A. That is the king pile of the HZM solution with, on the
10 right-hand side, one connector added to it.

11 Q. So that's the new type of king pile that you sell?

12 A. Yes, it is.

13 Q. As for the document as a whole, can you identify the
14 document for the record.

15 THE COURT: Why don't you go to the first --

16 MR. BANDINI: I'm sorry.

17 MR. RAMOS: Objection. Ambiguous.

18 MR. BANDINI: I'll rephrase the question.

19 Q. Have you seen this document before?

20 A. Yes, I have.

21 Q. What is it?

22 A. It's a U.S. patent.

23 Q. Have you seen it before this case?

24 A. No. I got involved, and I saw it since the case.

25 Q. Have you had occasion to discuss this patent with anyone at

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1 ArcelorMittal?

2 A. Yes.

3 Q. In what regard?

4 A. Linked to this case.

5 Q. I'm sorry?

6 A. Linked to this case. Since this case began.

7 MR. BANDINI: Okay. Move to admit Exhibit 20.

8 MS. GHAVIMI: Objection. Foundation and relevance.

9 THE COURT: Sustained.

10 MR. BANDINI: All right. Let's turn to -- let's put
11 that aside for a second. Let's turn to Plaintiff's Exhibit 11.

12 Q. Do you recognize this document?

13 A. Yes.

14 Q. What is it?

15 A. It's a brochure about the HZM steel wall system, edition
16 2013.

17 Q. Is this a document that Skyline keeps and distributes in
18 the ordinary course of its business?

19 A. It did.

20 Q. I should rephrase. Did Skyline keep and distribute this
21 document on or about the year 2013 in the ordinary course of
22 its business?

23 A. Yes.

24 Q. Are the products indicated in this brochure the products
25 that Skyline was selling in 2013?

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1 A. Yes.

2 MR. BANDINI: Move to admit and publish Plaintiff's
3 Exhibit 11.

4 THE COURT: Any objection?

5 MS. GHAVIMI: No objection.

6 THE COURT: Admitted.

7 (Plaintiff's Exhibit 11 received in evidence)

8 BY MR. BANDINI:

9 Q. Now, Mr. De Mey, can you look at the cover page of
10 Plaintiff's Exhibit 11 and tell us what that shows. And in
11 particular, I know there's a picture. What does that drawing
12 on top of the picture depict?

13 A. So the drawing on top is again the same thing, except this
14 time it describes HZM solution. So it shows the king pile beam
15 on top, then the connector, and then the sheet pile on the
16 lower half.

17 Q. Again, if you could remind us of what was different between
18 this and the HZ system.

19 A. So the difference here is the king pile has a slightly
20 different shape in the HZM system compared to the HZ system.

21 Q. What's the difference, if you could describe it in the
22 shape?

23 A. The difference is that there would be an accumulation of
24 steel towards the end of the sides of the beam in the old
25 system, and here, it's done slightly differently.

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1 Q. Now take a look at page 88 of that document. And there's a
2 picture on the lower right which we'll blow up for you. What
3 does that depict?

4 A. It shows the king pile of the HZM system with two
5 interlocks, two connectors.

6 Q. Okay. Is that the king pile design that Skyline has been
7 selling as part of the HZM system?

8 A. Yes.

9 Q. I asked you to take a look at figure 7 of Exhibit 20 which
10 you directed me to earlier. Have you ever compared the HZM
11 sold by Skyline with the one depicted on figure 7 of
12 Exhibit 20?

13 A. Can you repeat the question. Make sure I understand it
14 right.

15 Q. Sure. Sure. We just looked at the catalog picture of
16 Exhibit 11, and I think you just told me that page 88 showed
17 the HZ king pile sold by Skyline?

18 A. Uh-huh.

19 Q. Is that correct?

20 A. Yes.

21 Q. That's right on the screen. Have you ever compared that
22 with the picture shown in figure 7 of Exhibit 20?

23 A. Yeah, yeah. Okay. Yes.

24 Q. We could put it on the witness --

25 A. That would probably be easier.

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1 MS. GHAVIMI: Objection, your Honor. Lacks foundation
2 and knowledge of the document, Exhibit 20.

3 THE COURT: You're objecting to the question?

4 MS. GHAVIMI: Eliciting testimony about Exhibit 20.

5 THE COURT: Just yes or no.

6 MS. GHAVIMI: Yes.

7 THE COURT: All right. Sustained.

8 MR. BANDINI: All right. I'll move on.

9 Q. Let's take a look at the other components of the HZ system,
10 the older system. Staying with 308, back to Exhibit 308, let's
11 look at page 5986 of that catalog. And if we could -- this is
12 in evidence, I believe. If you could look at that page, we've
13 blown up the pictures to make them easier to see.

14 What is depicted on the top part of that page?

15 A. That is called an AZ intermediate sheet pile.

16 Q. What is depicted on the bottom of the page?

17 A. These are three types of connectors.

18 Q. Now, these, of the piles and the connectors, were sold with
19 the old system; correct?

20 A. Yes.

21 Q. How do these products, the AZ intermediary piles and the
22 connectors sold with the old HZ system, differ, if at all, from
23 the AZ piles and connectors sold with the new HZM system?

24 MR. RAMOS: Objection, your Honor.

25 THE COURT: Overruled.

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1 A. Not at all. No change.

2 Q. Not at all.

3 And how long has Skyline been selling these AZ piles
4 and connectors in this form?

5 A. As long as they've been made.

6 Q. Okay. Now, you should have in front of you an envelope.

7 A. Yes.

8 Q. I believe if you look inside, can you tell us what's inside
9 the envelope.

10 A. I can.

11 Q. What is inside the envelope?

12 A. These are small plastic examples of what a sheet pile combi
13 wall could look like.

14 Q. Do you --

15 THE COURT: Just leave them there for now, please.

16 Q. Yes. Leave them down for a second.

17 Where did you obtain them from?

18 A. We received those from ArcelorMittal.

19 Q. When?

20 A. Probably 15 years ago.

21 Q. Fifteen years ago?

22 A. Fifteen years ago, yeah.

23 Q. So those were not created for purposes of this case?

24 A. No, no, not at all.

25 Q. When you say we received them from ArcelorMittal, you mean

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1 Skyline?

2 A. Yes, Skyline, yeah.

3 Q. So were they at Skyline's offices?

4 A. Yes, they were.

5 Q. What are they used for, if anything?

6 A. Well, so we have those little plastic examples to show to
7 customers or engineering firms or universities to show or make
8 it visible, really tangible, what we really make or what we
9 sell.

10 MR. BANDINI: Your Honor, at this point I would offer
11 the witness' testimony with respect to these models to
12 demonstrate how the system works, subject to any objection.

13 THE COURT: Meaning you want to use the models as a
14 demonstrative or you're offering the models as an exhibit?

15 MR. BANDINI: I want to use the models as a
16 demonstrative.

17 THE COURT: Any objection?

18 MS. GHAVIMI: No objection.

19 THE COURT: All right. You may proceed.

20 MR. BANDINI: So I'm not sure what's the simplest,
21 your Honor, whether he can put them on the shelf next to the
22 witness stand or whether he should perch on this bar. Whatever
23 the Court prefers.

24 THE COURT: I'm going to go with the witness stand
25 bar, and hopefully jurors can see.

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1 And jurors at the end of the first row, if you want to
2 move around closer, you're welcome to, but I would hope that
3 you could see from there anyway.

4 BY MR. BANDINI:

5 Q. All right. So my question, sir, first is if you could take
6 us through the individual pieces of the model and what they
7 are, and then we'll move on from there.

8 A. Yes, I can. So do I start?

9 Q. Yes, you may start.

10 A. This, as you've seen, is called a beam. That's the king
11 pile, these elements. They go vertically in the ground like
12 this, as you saw in the picture, one by one by one, advance.

13 Q. Hold on. Let me stop you right there. When they're in
14 real life, are they that long or longer?

15 A. No. These could be up to over 100 feet long.

16 Q. One hundred feet long into the ground?

17 A. Yes.

18 THE COURT: These are the sort of I-shaped --

19 THE WITNESS: Yes.

20 THE COURT: -- objects?

21 THE WITNESS: Yeah.

22 THE COURT: And they go into the ground?

23 THE WITNESS: And they go vertically like this. So
24 imagine one long piece of -- of beam like 100 foot long,
25 60 feet long, 70 feet long.

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1 THE COURT: But if you were looking at them from the
2 sky, they would essentially appear to be a letter "I"; is that
3 a fair statement?

4 THE WITNESS: If you look up, you would see an "I,"
5 yes.

6 THE COURT: Okay. Go ahead.

7 BY MR. BANDINI:

8 Q. What are the other pieces?

9 A. So as you see here, we have something on here which is
10 called a connector, which is a piece of steel which has the
11 same length as a sheet pile, not necessarily as the beam, but
12 as the sheet pile, which will be attached also vertically in
13 there like this. Okay. As you see, it's the same special
14 shape that is attached in the factory in Luxembourg. It's slid
15 in there and then attached by a small welding at notable
16 points.

17 THE COURT: That's just a small connecting piece --

18 THE WITNESS: Yes.

19 THE COURT: You need to wait for me to finish.

20 THE WITNESS: Sorry.

21 MR. BANDINI: It's very bad to interrupt the judge,
22 which I just did.

23 THE COURT: Bad to interrupt anyone because it makes
24 that woman's job too difficult. But it's a little different
25 than speaking in the normal world.

GBTHSKY5

De Mey - Direct

1 Now, the connector just slides onto this sort of end
2 of the top and the bottom of the "I," if you will, the ends of
3 those pieces; is that a fair statement?

4 THE WITNESS: Yes, your Honor.

5 THE COURT: Okay. Go ahead.

6 THE WITNESS: So here I have an example here of two
7 beams, all right, to make it simple. Each side gets one of
8 those connectors, okay. Now, multiple beams will be driven in
9 the ground vertically. Here, one next to the other, but not
10 exactly next to the other because you need enough room to put
11 an intermediate sheet pile, which I'll show in a second.

12 We'll put multiple of those elements as long as your
13 wall is long. Then you need to add something like this, which
14 is a sheet pile. A sheet pile is -- as Mr. Bandini said, it's
15 a Z-shaped piece of steel, okay. It has something very
16 specific at the ends, both ends, that's called the interlock.
17 That is specific enough that it actually can go into each other
18 like this and create a pair of sheet piles. Those elements as
19 well are 50, 60, 70, 80 feet long.

20 So they go vertically like this in here, and then they
21 will perfectly fit into this one element, which is not as easy,
22 and the other one. We've now created an HZ solution.

23 THE COURT: All right. So you slide those into the
24 connectors, thereby connecting the two I-beam --

25 THE WITNESS: Yes.

GBTHSKY5

De Mey - Direct

1 THE COURT: -- king piles, yes?

2 THE WITNESS: Exactly.

3 THE COURT: All right.

4 THE WITNESS: This is on a continuous way. So first
5 beams are driven and then the sheet piles are driven all along.

6 BY MR. BANDINI:

7 Q. So with that thing you've just created -- can you hold it
8 up again, would that be called the combi wall?

9 A. Yes, that is a combi wall.

10 Q. Okay. Why is it called a combi wall?

11 A. Because it's combines multiple elements, combines I-beam
12 and a sheet pile connected with those connectors.

13 Q. Now, can engineers or contractors use just the AZ
14 intermediary piles to make a wall?

15 A. Absolutely.

16 Q. Can you show us how that's done.

17 A. I can. So we have this one pair of sheet piles you can
18 drive in the ground, and you can drive another pair of sheet
19 piles in the ground, and so on and so on, as long as you need
20 be.

21 Q. Can you hold that up so everybody can see.

22 Would that be called a combi wall?

23 A. No, that's not a combi wall.

24 Q. That's an AZ wall?

25 A. That's an AZ wall.

GBTHSKY5

De Mey - Direct

1 Q. Do you have -- you could put those down for now. Do you
2 have any demonstrative pictures of a wall that's just an AZ
3 wall?

4 A. Yes, we do.

5 Q. Can we put in front of you what we've labeled D4 and ask
6 you to look at that. What is this?

7 A. This is an AZ sheet pile wall, continuous wall.

8 MR. BANDINI: Right. I'd ask that this be published
9 to the jury as a demonstrative.

10 THE COURT: Any objection?

11 MS. GHAVIMI: No objection.

12 THE COURT: Granted.

13 BY MR. BANDINI:

14 Q. So how does this correspond to what you were just showing
15 in the models? Which of the models does this correspond to?

16 A. It is exactly the same as this.

17 Q. As that AZ?

18 A. Yes.

19 Q. So did Skyline sell these AZ piles to make these walls
20 before the HZM system came along?

21 A. Yes.

22 Q. Now, in what instances, based on your experience, would an
23 engineer choose this type of wall instead of the HZM wall?

24 MR. RAMOS: Objection.

25 THE COURT: Overruled.

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De Mey - Direct

1 A. So I think as we explained in the first page, very first
2 image we showed, a function of the load that the wall needs to
3 carry, or the weight that it needs to carry, we will use only
4 an AZ wall or go into the combi wall when the loads are
5 heavier. Combi wall means including beams and piles.

6 Q. As president of Skyline, are you aware of how much this
7 type of wall Skyline sells compared to how much of the combi
8 HZM wall it sells?

9 MR. RAMOS: Objection.

10 THE COURT: Overruled.

11 A. About ten times more.

12 Q. Ten times more of what?

13 A. Of AZ sheet piles just alone as one wall compared to combi
14 walls.

15 Q. It sells ten times more of these AZ walls?

16 A. Yes, ten times more of this compared to solution HZM.

17 Q. How long has that been true?

18 A. Forever. Since this company has been in business.

19 Q. Do you know approximately how many dollars in sales Skyline
20 made of the AZ pile walls without the HZM system for the years
21 2013, '14, and '15?

22 A. It's between 100- and \$150 million per year in sales.

23 Q. Now, are you familiar with how these AZ piles are made?

24 A. Yes.

25 Q. How are you familiar with that?

GBTHSKY5

De Mey - Direct

1 A. I have seen it with my own eyes.

2 Q. You've seen them made?

3 A. Yes, I've seen them made, yeah.

4 Q. Where have you seen them made?

5 A. In Luxembourg, in the steel mill where it's being made.

6 Q. Have you prepared for the jury a demonstrative
7 demonstrating how they are made?

8 A. Yes.

9 Q. Let's put in front of you what we marked as D5 and ask you
10 if that is the demonstrative you're referring to?

11 A. Yes, it is.

12 MR. BANDINI: Permission to publish this demonstrative
13 to the jury?

14 THE COURT: Any objection?

15 MS. GHAVIMI: No objection.

16 THE COURT: All right. You may.

17 BY MR. BANDINI:

18 Q. So I notice -- before we get into the specifics of this, I
19 notice the title says "Manufacturing by Hot-Rolling." Do you
20 see that?

21 A. Yes.

22 Q. What is hot-rolling?

23 A. Hot-rolling means that the shape of the end product is
24 obtained when the steel is almost at the liquid stage, so above
25 1,000 degrees.

GBTHSKY5

De Mey - Direct

1 Q. The steel is at a thousand degrees?

2 A. The steel is at a thousand degrees, yes.

3 Q. Now, can you take us through what you show in this
4 demonstrative to explain how hot-rolling is used to make the AZ
5 sheet piles.

6 A. Yes. So there's something called a steel blank on this
7 picture. It looks like a beam. It's not exactly a beam. It's
8 a semifinished product. So from liquid steel you will make a
9 beam blank, or a steel blank, which is cooled down and
10 afterwards reheated at around a thousand degrees,
11 approximately, and then passed through a number of passes,
12 which are big sets of rolls. So the steel will roll through
13 these rolls, and these rolls come closer and closer and have a
14 more specific shape, more special shape. And every different
15 roll that it goes through is called a pass. And after a number
16 of passes, you end up with a product called the AZ sheet pile.
17 And here you see the stage-by-stage evolving, probably till it
18 goes to that final shape.

19 Q. Are these AZ sheet piles shape cut at all?

20 A. Not at all.

21 Q. How about the connectors that are used with the HZM system?
22 Are you familiar with how they are manufactured?

23 A. Yes, I am.

24 Q. Are those shape cut at all?

25 A. No.

GBTHSKY5

De Mey - Direct

1 THE COURT: How are they manufactured?

2 THE WITNESS: There's two ways of making it. One is
3 rolling very similar to this.

4 Q. Hot-rolled.

5 A. Hot-rolled. And the other one is extrusion, which is a
6 different process.

7 THE COURT: What does "shape cut" mean?

8 THE WITNESS: "Shape cut" means that you cut it with a
9 grinder, grinding machine, to create the shape. It's not
10 what's done here.

11 THE COURT: All right.

12 Q. Again, so since you were here for the openings, you heard
13 reference to a company that was called L.B. Foster. Have you
14 ever heard of that company before?

15 A. Yes, I have.

16 Q. What is L.B. Foster?

17 A. L.B. Foster is a competitor of ours.

18 Q. A competitors of yours?

19 A. Yes. They compete with us.

20 Q. Have you prepared a demonstrative showing the steel
21 industry and competition, as you understand it, in the
22 industry?

23 A. Yes.

24 Q. So let's show D6 to you, the first page, and ask you if
25 this was prepared at your direction. Was this prepared at your

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De Mey - Direct

1 direction?

2 A. Yes, it was. Sorry.

3 Q. Does this purport to show the competitors at your level in
4 the steel industry?

5 A. It does.

6 MR. BANDINI: I move to display this and the remaining
7 ones in this series to the jury as a demonstrative.

8 THE COURT: Any objection?

9 MR. RAMOS: Yes, I do object, your Honor.

10 THE COURT: Sustained.

11 MR. BANDINI: All right. We'll just talk through it.

12 Q. Who manufactures -- let me back up.

13 Skyline competes with L.B. Foster; correct?

14 A. Yes.

15 Q. In what sense? What does L.B. Foster do?

16 A. L.B. Foster sells and distributes steel foundation
17 products.

18 Q. Are there any other companies besides Skyline and L.B.
19 Foster that distribute and sell steel foundation parts?

20 A. Yes. There's a wide number of them, yeah.

21 Q. I'm sorry?

22 A. There's a large number of people competing with us, yes.

23 Q. Okay. All right. Let's go above the level, the
24 distributor level. Where does Skyline get the HZM product to
25 distribute?

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De Mey - Direct

1 A. Skyline buys its steel products from companies like
2 ArcelorMittal like we talked before, like Nucor like we
3 discussed before, and other steel mills.

4 THE COURT: Counsel, can you take the slides down,
5 please.

6 MR. BANDINI: Sure. Take the slides down.

7 THE COURT: Thank you.

8 Q. You said it buys -- I'm sorry. I had a problem hearing
9 you. You say Skyline buys from ArcelorMittal?

10 A. Yes.

11 Q. We talked about them before. And where are they located?

12 A. They're located around the world, but we buy the product
13 from Luxembourg.

14 Q. Luxembourg.

15 And where else did you say Skyline buys product from?

16 A. From Nucor.

17 Q. Okay. What about your competitors? Let's take L.B.

18 Foster. Do you know where L.B. Foster obtains its products?

19 A. Yes.

20 Q. Where do they obtain its products from?

21 A. They buy products from a company called Gerdau.

22 Q. Can you spell that, please.

23 A. G-e-r-d-a-u.

24 Q. G-e-r-d-a-u?

25 A. Yes.

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De Mey - Direct

1 Q. What is Gerdau?

2 A. Gerdau is a Brazilian steel company with operations also in
3 the United States, and they buy from them, from Gerdau.

4 Q. So what type of company is Gerdau? Is it a distributor?

5 A. No, it's a steel company.

6 Q. It's a steel company like -- like ArcelorMittal?

7 A. Like ArcelorMittal.

8 Q. Like Nucor?

9 A. Like Nucor.

10 Q. Okay. So there are steel companies and then there are
11 distributors?

12 A. Yes.

13 Q. Skyline's a distributor?

14 A. Yes.

15 Q. Now, we heard about PilePro. Where does PilePro fit in
16 this market, if you know?

17 A. PilePro supplies companies like L.B. Foster and its
18 competitors.

19 Q. And what does, to your knowledge, PilePro supply?

20 A. Mainly connectors.

21 Q. Connectors?

22 A. Yes.

23 Q. Now, we've talked about the steel mills, the distributors,
24 PilePro. Who does Skyline sell to? Who are your customers?

25 A. Our customers are contractors.

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De Mey - Direct

1 Q. Contractors as in construction project contractors?

2 A. Construction contractors, general contractors,
3 subcontractors.

4 Q. In terms of who Skyline directs its business efforts to,
5 were there any particular types of individuals that you sell
6 to?

7 A. Yeah. We sell mainly to -- well, put it differently, our
8 product is being used in big foundation projects. So these are
9 projects that the Department of Transportation wants to build,
10 like a new bridge or a new highway, or somebody who owns a port
11 and wants to build a new cay terminal for container vessels.
12 And we sell to the contractors that will -- that were the low
13 bidder for those jobs. And so they need steel at some point,
14 and we will sell to those contractors.

15 Q. What I'm getting at, you heard Mr. Ramos talk about highly
16 educated people. You heard him talk about doctors and lawyers
17 and engineers. Does Skyline market to doctors and lawyers?

18 A. We do not sell to any doctor or any lawyer.

19 Q. So you market to engineers; is that correct?

20 A. Yeah, we sell to engineers and we -- yep.

21 Q. Over the course of your job career, have you ever had
22 discussions with engineers about what factors they consider
23 important in deciding what combi wall system to buy?

24 A. Absolutely, yes.

25 THE COURT: All right. We're actually going to take a

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De Mey - Direct

1 break there.

2 Ladies and gentlemen, it's 2:57. I wanted to give
3 everybody a break, since otherwise it will be a long afternoon.
4 Why don't you go to the jury room -- you can stretch your legs,
5 use the facilities -- and be ready to go in, let's say, ten
6 minutes.

7 Couple reminders that you will hear me say over and
8 over throughout the case. Number one, do not discuss the case.
9 You have heard only a little bit of the evidence, and, again,
10 you should not discuss the case with each other or anyone else,
11 for that matter until -- well, you shouldn't discuss it with
12 each other until your deliberations begin, and you shouldn't
13 discuss it with anyone else until after you have been
14 discharged as jurors. So do not discuss the case. Do not
15 communicate about the case in any way, shape, or form. And not
16 that you could in the jury room, but don't do any research
17 about the case either. And, finally, keep an open mind.

18 With that, please be ready to go in ten minutes, and
19 enjoy your break. Thank you.

20 (Jury excused)

21 (Continued on next page)

GBTHSKY5

De Mey - Direct

1 (In open court)

2 THE COURT: You may be seated.

3 Mr. De Mey, you may step down.

4 Now, two quick sort of housekeeping-ish or logistics
5 things. One is I prefer that only one lawyer make objections.
6 So whichever lawyer is going to conduct the cross-examination,
7 that lawyer should make objections and only that lawyer should
8 make objections.

9 You can go around to your seat, Mr. De Mey.

10 Number two, since there's no objection, and I assume
11 both sides are going to use them, I don't have an objection in
12 principle to use of demonstratives. I tend to be of the view
13 that it's better to actually admit exhibits, but in any event,
14 I certainly want the record to be clear as to what is being
15 used. So I think that you may have referred to these as D and
16 then a number. I hope, and assume, that that sort of system
17 will continue throughout the case. I just want a record made
18 as to what you're showing so that for purposes of appeal, or
19 otherwise, it's apparent what's been shown. So just keep that
20 in mind going forward.

21 With that, Mr. Bandini had wanted to raise an issue at
22 sidebar. You want to raise that now or should we talk about it
23 later?

24 MR. BANDINI: I can raise that now, your Honor.

25 (Continued on next page)

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1 MR. BADINI: I can raise that now, your Honor. While
2 we are on the issue of demonstratives though, I was a little
3 surprised by the objection to the corporate relationships,
4 because we met and conferred last night, and we were told there
5 was no objection. In any event, I walked through it.

6 THE COURT: All right. I didn't think it was really
7 necessary in the sense that it wasn't technical testimony,
8 didn't really seem necessary to aid the jury in understanding
9 the testimony. That was why I ruled as I did. Had I been told
10 there was agreement to use them, I might have ruled
11 differently. If you want to flag that in advance going
12 forward, you are welcome to do so, and then it might make
13 things go a little quicker.

14 MR. BADINI: Sure. But the more serious objection --
15 and I am of the view that I try not to object to openings while
16 they're happening -- but I believe that Mr. Ramos, whether
17 intentionally or not -- and I don't assume any ill will on his
18 part -- I believe walked over the line in a couple of instances
19 in violation of this court's order relating to spoliation in
20 this regard. The court at docket 299, as you know, precluded
21 PilePro from arguing that, one --

22 THE COURT: I know the ruling. Tell me where you
23 think it crossed the line.

24 MR. BADINI: Sure. The ruling has two significant
25 parts. One is --

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1 THE COURT: Again, I know the ruling. Tell me where
2 you think it crossed the line.

3 MR. BADINI: OK. One, he questioned whether engineers
4 would have made their decision -- or changed their decision --
5 based on the infringement warning, and the ruling of course
6 says questioning the effect. And, two, with respect to the
7 volume of people or the number of people, he made an argument
8 relating to the Thanksgiving and Christmas period, and the
9 implication, as I took away from it, was how could many people
10 have been viewing it during that time period, which I believe
11 also crossed the line.

12 I am sorry. One more point. There was a reference to
13 how people were directed to the PilePro website in Skyline's
14 marketing materials, which I took as a suggestion that we were
15 implicitly encouraging people to see the lead times.

16 That reference, which was earlier on, was put on the
17 Skyline marketing materials as part of the settlement
18 agreement, and again that violated the discussion we had about
19 not referencing obligations under the settlement agreement.

20 THE COURT: The reference in the marketing materials
21 to the website was pursuant to the former settlement agreement?

22 MR. BADINI: The settlement agreement between Skyline
23 and PilePro said a couple of things, but in broad strokes
24 Skyline was to purchase its connectors from PilePro, and in
25 return it was to put them in its brochures in certain ways,

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1 including telling consumers how to get them. And the way they
2 could get them was to go to the PilePro website. So they were
3 there because we needed to give contact information to comply
4 with the settlement agreement.

5 THE COURT: OK. So what do you propose I do, or what
6 is the application?

7 MR. BADINI: The application is for a curative
8 instruction. I don't have one here, but we could draft one
9 overnight for the court's review.

10 THE COURT: All right. So why don't you draft one,
11 and then we can consider it in the context of a specific
12 proposal. I think I had told you to perhaps draft one last
13 week and have it in your back pocket.

14 MR. BADINI: Although I didn't know precisely what
15 would happen but, yes, point taken, your Honor.

16 THE COURT: Understood. I will decide whether it's
17 appropriate or necessary. I certainly have the same reaction
18 in particular to the suggestion that few people would have
19 visited the website during the busy holiday period. I thought
20 that struck me as the clearest case perhaps for crossing the
21 line of my ruling. I think let's defer discussion until there
22 is a specific curative instruction on the table. I may decide
23 not to give it at this point, but let this just be a little bit
24 of a warning to folks at the back table that I will certainly
25 police that ruling and make sure that it doesn't get crossed.

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1 And the jury has been told that what the lawyers say is not
2 evidence, and if evidence in later argument is not made on this
3 score, then it may just be that it's better to leave it as is,
4 but I will consider it when there is a curative instruction
5 proposed. Anything else we have to take up? Otherwise, I want
6 to give you a couple minutes before we resume.

7 MR. RAMOS: Real quick, your Honor, and that is with
8 respect to objections. I'm sorry, forgive me if I didn't catch
9 when you were giving the jury its initial instructions with
10 respect to what objections are and what their application is in
11 the case. I don't know if the court has done that.

12 THE COURT: I did. I explained that to them, and if
13 you had listened, you would have heard that. Anything else?
14 Be back in four minutes, and we will be ready to go.

15 (Recess)

16 (Continued on next page)

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18
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De Mey - direct

1 (Jury present)

2 THE COURT: Welcome back, ladies and gentlemen. I
3 hope you had an enjoyable break. We will continue with the
4 direct examination of Mr. De Mey.

5 Mr. De Mey, I remind you you are still under oath and
6 to speak slowly, clearly and wait for the question to finish.

7 Go ahead.

8 MR. BADINI: Thank you, your Honor.

9 LAURENT DE MEY, resumed.

10 DIRECT EXAMINATION (Continued)

11 BY MR. BADINI:

12 Q. Welcome back, Mr. De Mey. I believe that the question we
13 left off on before the break, just to put you back in the
14 context, was whether in the course of your career you had
15 discussions with engineers about the factors they considered in
16 deciding which sheet pile product to purchase. Do you remember
17 that question?

18 A. I do.

19 Q. And can you remind us of your answer?

20 A. Yes, my answer was yes.

21 Q. OK. How many such discussions have you had?

22 A. Multiple, tens and tens of conversations.

23 Q. In what context were those discussions?

24 A. In the context of selling or promoting our product to the
25 engineering community.

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De Mey - direct

1 Q. OK. And during those discussions, did you come to learn
2 from the engineers, did they tell you, in other words, what
3 factors they considered important in choosing a sheet pile
4 product?

5 A. Yes.

6 Q. Which factors?

7 A. The main factor is availability, knowing when the material
8 will be available.

9 MS. GHAVIMI: Objection. Hearsay, your Honor.

10 THE COURT: Overruled.

11 A. And the second factor is obviously its technical
12 specificities, what it can do, how it is made, what the weight
13 would be, what the steel grades would be, the details of the
14 product.

15 Q. And in those discussions when the issue of availability
16 came up, did they tell you what they meant by availability?

17 A. Yes.

18 Q. What did they tell you?

19 A. When an engineer designs a technical solution to a
20 technical problem, they will want to be absolutely certain that
21 the product that is specified will be available in the market
22 when the project actually goes into execution. They want to
23 know whether the product will be there and exists and will be
24 available for somebody to use.

25 Q. Did they tell you why that was important to them?

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De Mey - direct

1 A. Well, of course your reputation would be a problem. If
2 they design something that is not available, it means that they
3 don't know what the market is.

4 Second of all, it takes a lot of time and a lot of
5 money to design projects, and once a project goes into
6 execution there is not much time left to really finish a job,
7 and, therefore, they really do not want to be confronted with a
8 situation in which the material would not be there, and
9 therefore redesign would have to take place and possible
10 consequences to delay the start of the project.

11 Q. Has Skyline ever lost a job based on availability or timing
12 issues?

13 A. Yes, sure we have.

14 Q. Are you familiar with the concept of lead times?

15 A. Yes.

16 Q. What does that mean to you?

17 A. The lead time is the time necessary between ordering the
18 steel or signing a contract to order the steel and the actual
19 delivery to the job site.

20 Q. And based on the size of the job and the requirements of
21 the customer, are you able to quote as a company the expected
22 lead times for the product they want?

23 A. Yes, we are.

24 Q. Has Skyline ever altered its lead times based on
25 extraordinary circumstances?

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De Mey - direct

1 A. Absolutely.

2 Q. And can you think of any examples when that has happened?

3 A. Yes. So, everybody remembers Super Storm Sandy, in this
4 area for sure. Well, based on examples like this, like natural
5 catastrophes, we will change any possible production schedules
6 we have, or try to accelerate production schedules with some of
7 our suppliers to be able to deliver material quickly. We had
8 the same thing happen during the Katrina hurricane. There has
9 been a huge need for steel, a very quick notice. People were
10 under water and steel was necessary to kind of protect them or
11 protect existing buildings, and we changed production schedule
12 both in our own facilities as well as our upstream partners,
13 people making steel for us.

14 Q. So, let's shift gears a little bit and talk about another
15 subject. Did Skyline ever learn of any letters that PilePro
16 sent to Skyline customers about the HZM system?

17 A. Yes.

18 Q. Did you ever hear of such a letter that went to John
19 Madonna Construction Company?

20 A. Yes.

21 Q. What is John Madonna Construction Company?

22 A. John Madonna is a contractor based on the West Coast, and
23 he is a customer of ours.

24 Q. How did Skyline learn of that letter from PilePro to John
25 Madonna Construction Company?

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De Mey - direct

1 A. Well, Mr. Madonna sent a letter to our office that we have
2 in Sacramento complaining about the fact that he had received a
3 letter from PilePro.

4 Q. Let me show you what we have premarked as Plaintiff's
5 Exhibit 280, two-eight-zero. Can you identify this for the
6 record?

7 A. Yes.

8 Q. What is it?

9 A. It is a letter from John Madonna to somebody called Matt
10 McLaughlin who worked in our Sacramento California office.

11 Q. When you say a letter, do you mean --

12 A. An e-mail, and there is an attachment here too.

13 Q. And what is the attachment?

14 A. The attachment is a letter from the PilePro group to John
15 Madonna Construction on November 1, 2013, signed by Mr. Wendt.

16 Q. And did you receive a copy of this cover e-mail and the
17 letter and the attachment to the letter at or about the time it
18 was sent to Skyline by Mr. Madonna on November 11, 2013?

19 A. Yes, I did.

20 MR. BADINI: I move to admit 280 and publish it to the
21 jury.

22 THE COURT: Any objection?

23 MS. GHAVIMI: No objection.

24 THE COURT: Admitted.

25 (Plaintiff's Exhibit 280 received in evidence)

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De Mey - direct

1 MR. BADINI: Thank you, your Honor.

2 Q. So, let's -- let's start with the -- well, let's start with
3 the cover page. Is this the e-mail you talked about from
4 Mr. Madonna?

5 A. Yes, I did.

6 Q. And let's go to the attachment, and then we will circle
7 back to the e-mail. So, let's look at the next page. Is this
8 the PilePro letter?

9 A. That is the PilePro letter, yes.

10 Q. And where was it sent?

11 A. It was sent to John Madonna Construction in California.

12 Q. OK. If you look at the subject line of the letter, can you
13 read that into the record, please.

14 A. It's called Bradley Canyon Levee Extension, Santa Maria
15 River and Tributaries.

16 Q. Do you know what that is a reference to?

17 A. That is a reference to a job that we supplied material to
18 John Madonna.

19 Q. Near the bottom, do you know who signed the letter on
20 behalf of PilePro?

21 A. Yes.

22 Q. Who signed it?

23 A. Mr. Wendt.

24 Q. And do you know who Rob Wendt is?

25 A. I do.

GBT7SKY6

De Mey - direct

1 Q. OK. So, let's look at the text of the letter. In the
2 first paragraph, can you read that into the record, please.

3 A. "Dear Sirs: It has come to our attention that an imported
4 HZM wall system supplied by Skyline Steel, Inc. may be
5 contemplated for use in connection with the above referenced
6 construction project."

7 Q. OK. Now the second paragraph, please.

8 A. "The United States Patent and Trademark Office has issued a
9 patent to PilePro, LLC that covers the wall system method being
10 sold by Skyline Steel and other third parties under the HZM
11 name. For your convenience and review, I am attaching a copy
12 of our patent."

13 Q. And the third paragraph, please.

14 A. "We are also attaching the original specifications using
15 steel made and manufactured in the United States by Gerdau and
16 PilePro. Should you wish to allow the supply of the originally
17 specified products, they are readily available."

18 Q. At the time that you saw this, did you have an
19 understanding of what Mr. Wendt meant by that paragraph?

20 A. Yes.

21 Q. What was that understanding?

22 A. He meant to replace the HZM products that we had supplied
23 or were supplying by another solution that he would supply.

24 Q. OK. Now let's look at the fourth paragraph of his letter.
25 Can you read that into the record.

GBT7SKY6

De Mey - direct

1 A. "This letter places you on notice of PilePro's patent
2 rights and constitutes a warning to you that PilePro will seek
3 to hold all parties participating in the project liable for any
4 damages to which it may be entitled in the event a wall system,
5 components or method that infringes PilePro's patents is
6 installed or otherwise used in this project."

7 Q. OK. Now let's turn back to the cover e-mail from
8 Mr. Madonna to the Skyline sales manager Mr. McLaughlin. What
9 did you understand Mr. Madonna to be asking for from Skyline?

10 A. He is asking for indemnification of liability of a
11 potential lawsuit that may come from us using this product.

12 Q. Now let's look in particular at the fourth paragraph.

13 Can we blow that up?

14 Can you read the first sentence, please.

15 A. "I must add emphasis on the fact that we have delivery of
16 the steel and have been installing the combi wall."

17 Q. Did you attach any particular significance to that
18 statement by Mr. McLaughlin?

19 A. Absolutely.

20 Q. What significance did you attach to it?

21 A. The fact that we already delivered material and that some
22 of it was already driven in the ground or had been installed,
23 as he says.

24 Q. So, did you consider it a possibility that you might have
25 to pay Mr. Madonna to rip up that combi wall and pay for that?

GBT7SKY6

De Mey - direct

1 A. Absolutely.

2 Q. How much would that have cost?

3 A. Hundreds of thousands, maybe millions.

4 Q. Of dollars?

5 A. Of dollars, yes.

6 Q. Certainly more than \$5,000, correct?

7 A. Definitely more than \$5,000.

8 MS. GHAVIMI: Objection, your Honor. It assumes facts
9 not in evidence.

10 THE COURT: Overruled.

11 Q. So, at the time you received this letter from Mr. Madonna
12 in what you call this request for indemnification, did you know
13 whether or not you would have to rip out the combi wall?

14 A. No, not at all, we did not know.

15 Q. What if anything did Skyline do in response to receiving
16 this e-mail from Mr. Madonna?

17 A. Well, he was asking to be getting an answer within 24
18 hours, of us covering his liability, which is what we did, by
19 offering him better indemnification.

20 THE COURT: Can you explain what you mean by
21 indemnification?

22 THE WITNESS: Well, we would indemnify him for his
23 possible lawyers fees, possible legal costs, possible rip out
24 of the material and reinstalling the wall, to all possible
25 consequences of this being a possible infringement of this

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De Mey - direct

1 patent.

2 THE COURT: By indemnification you mean an agreement
3 whereby Skyline would agree to cover any costs that are
4 connected to this matter that would otherwise have been
5 incurred by the Madonna company; is that correct?

6 THE WITNESS: Yes, your Honor.

7 THE COURT: OK.

8 Q. And did you agree to give him that indemnification or
9 promise?

10 A. We did.

11 Q. OK. Take a look at what we've marked as Exhibit 275. Can
12 you identify this document for the record.

13 A. Yes.

14 Q. What is it?

15 A. It's an indemnification agreement from Skyline towards John
16 Madonna Construction.

17 Q. OK. Are those -- is that your signature on the last page?

18 A. That is my signature, yes.

19 Q. And are those your initials on the first two pages?

20 A. Yes.

21 MR. BADINI: Move to admit Exhibit 275 and ask
22 permission to publish it to the jury.

23 THE COURT: Any objection?

24 MS. GHAVIMI: No objection.

25 THE COURT: Admitted.

GBT7SKY6

De Mey - direct

(Plaintiff's Exhibit 275 in evidence)

Q. Take a look at the first page under number one, indemnification. Can you just read -- you don't have to read the whole paragraph, but can you read the first few lines, "In the event ... "

A. "In the event any claim, suit, or cause of action alleging to infringement of patents is filed against a party (Indemnatee)..."

Q. Let me stop you there, because it goes on for a long time. Did you understand that -- what did you understand this letter agreement -- let me rephrase that. What did you understand this indemnification document to obligate Skyline to do?

A. It would obligate Skyline in case there would be any legal action from PilePro to John Madonna Construction, that Skyline would cover everything, going from legal fees, to defense fees, to even possible consequences like tearing apart the entire wall and starting over.

Q. And did you send this indemnification agreement in this form with your signature to Mr. Madonna?

A. Yes, we did.

Q. You will see on the last page there is no signature by Mr. Madonna on this document.

A. I see it.

Q. Did you view that as in any way diminishing what you viewed as your obligations to Mr. Madonna?

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De Mey - direct

1 A. No.

2 Q. OK. Was there anything else Mr. Madonna asked of Skyline
3 as a result of receiving PilePro's letter? So, for example,
4 did they ask you to pay his legal fees?

5 A. Yeah, sure, they asked us to pay their legal fees.

6 Q. And did Skyline do so?

7 A. We did.

8 Q. Let's shift gears again. Putting aside the letters or the
9 letter to Mr. Madonna, do you know whether PilePro maintains a
10 website?

11 A. Yes, PilePro does.

12 Q. Have you ever visited the PilePro website?

13 A. I have.

14 Q. Are you aware of the infringement accusation that PilePro
15 made on its website?

16 A. I am.

17 Q. Let me show you what we have premarked as Plaintiff's
18 Exhibit 19 and ask you whether you are familiar with this.

19 A. Yes.

20 Q. What is this?

21 A. This is a page from the iSheetPile.com website, that this
22 describes a product that we called the HZM. That describes
23 something that we sell. But there is a warning on top here
24 that is very visible.

25 Q. Don't read the warning.

GBT7SKY6

De Mey - direct

1 A. There was a warning.

2 Q. Move to enter Exhibit 19 into evidence and publish to the
3 jury.

4 THE COURT: Can we get a timeframe, Mr. Badini?

5 MR. BADINI: Sure.

6 Q. Do you know when this warning was posted by PilePro on the
7 website, approximately?

8 A. Approximately, yeah. At the time of our -- at the time we
9 had this discussion, two or three years ago.

10 Q. Is this a screen shot?

11 A. Oh, that could be wrong.

12 THE COURT: Is this a screen shot from the website?

13 THE WITNESS: Yes, your Honor.

14 THE COURT: And do you know when this screen shot was
15 taken?

16 THE WITNESS: A couple months ago, two or three months
17 ago. I don't know.

18 Q. Do you know -- let me rephrase. Do you know when the
19 infringement accusation was posted by PilePro on the website?

20 A. Yeah. In -- sorry. I think it's 2013 we had our original
21 discussion.

22 THE COURT: You can't let your voice trail off,
23 because then nobody can understand the last words that you say.
24 So, you say you recall the infringement accusation being on the
25 website in 2013.

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De Mey - direct

1 THE WITNESS: I think it was, yes.

2 THE COURT: OK, next question.

3 MR. BADINI: Just same motion to admit and publish.

4 THE COURT: All right. Any objection?

5 MS. GHAVIMI: No objection, your Honor.

6 THE COURT: Admitted.

7 (Plaintiff's Exhibit 19 received in evidence)

8 Q. Do you have it in front of you now Mr. De Mey?

9 A. I do.

10 Q. Can you please for the benefit of the jury read the warning
11 into the record.

12 A. "Warning: This product infringes a U.S. patent owned by
13 PilePro LLC. Click here to view the patent. If you would like
14 more details and to use this patented system, please e-mail
15 info at PilePro.com or call 866-666-74883."

16 Q. Now, what products are depicted on that page? And maybe we
17 can take off the -- yeah, thank you. Take off the -- what
18 products are depicted on that page?

19 A. This is the HZM system, and its individual components.

20 THE COURT: Just again, to get the timeframe, your
21 recollection and understanding is that the infringement warning
22 was posted sometime in 2013?

23 THE WITNESS: Yes.

24 THE COURT: And have you been to the website since
25 2013?

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De Mey - direct

1 THE WITNESS: I have.

2 THE COURT: And is the infringement warning still
3 there?

4 THE WITNESS: No, no.

5 THE COURT: So this screen shot, do you know when it
6 was created, since the infringement warning is there?

7 THE WITNESS: I don't know. I don't.

8 THE COURT: Does this accurately reflect what the web
9 page looked like in the period in 2013 that you are describing?

10 THE WITNESS: Looks like it, yes.

11 THE COURT: OK, go on.

12 MR. BADINI: Thank you, your Honor.

13 Q. So you said you have visited the website since then?

14 A. Yes, I have.

15 Q. When is the most recent time you visited the PilePro
16 website?

17 A. Last week.

18 Q. Last week?

19 A. Yes.

20 Q. In the visits to the website, have you seen whether the
21 PilePro uses the HZM trademark on its website?

22 A. Yes, it does.

23 Q. Does it publish what we've called lead times for HZM
24 products?

25 A. Yes, it does.

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De Mey - direct

1 Q. Did Skyline ever provide this lead time information to
2 PilePro to publish on the website?

3 A. No.

4 Q. Do you know where PilePro got it?

5 A. I have no idea.

6 Q. Did you take a look at the precise lead times that were
7 shown for Skyline products?

8 A. Yes, there are a couple.

9 Q. Based on your experience were they accurate?

10 A. No, I don't think they are.

11 Q. Were they some sort of an average of Skyline's lead times?

12 A. No.

13 Q. OK. Let's take a look at another exhibit, 573. Can you
14 identify this for the record?

15 A. Yes, I can.

16 Q. And what is it?

17 A. It is a page from iSheetPile.com.

18 Q. And have you seen this page on your visits to the website?

19 A. Yes.

20 MR. BADINI: Move to admit and publish 573.

21 MS. GHAVIMI: No objection.

22 THE COURT: Admitted.

23 (Plaintiff's Exhibit 573 received in evidence)

24 Q. Now that the jury is looking at it, can you tell us what is
25 shown in the middle of the page of this screen shot?

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De Mey - direct

1 A. In the middle of the page you see something called "or find
2 a sheet pile section."

3 Q. And beneath that, what are those things that are listed?
4 What are those?

5 A. So all of these names that you see, an exact VZ22 or VZ13,
6 or VZ27 and so forth, are all different types of sheet pile
7 products.

8 Q. And do those include some of Skyline's sheet pile products?

9 A. Yes, absolutely.

10 Q. For example, which ones in that list?

11 A. VZ22, ZV26, 40, and so on. HZM also.

12 Q. And based on your visit, do you know what happens when you
13 click on one of those links?

14 A. So when you click on those, the page will describe in
15 detail this one solution you picked, will describe its
16 technical specifications. It will also offer a number of
17 competing solutions to the one that you just clicked; will
18 describe the other solutions and their specificities.

19 Q. All right. So let's take a look at an example. Let's look
20 at Exhibit 574. Can you identify this for the jury.

21 A. Yes, I can.

22 Q. What is this?

23 A. It is the detail page that will appear if you click on the
24 HZM 1180 solution.

25 Q. And that's a Skyline product.

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De Mey - direct

1 A. That is a Skyline product.

2 MR. BADINI: Offer 574 and permission to publish,
3 please.

4 MS. GHAVIMI: No objection.

5 THE COURT: Admitted.

6 (Plaintiff's Exhibit 574 received in evidence)

7 Q. Now take a look at the picture. This is a Skyline product,
8 correct?

9 A. Yes, sir.

10 Q. Now, this exhibit has two pages because of the size of the
11 page. If you look at the first page, at the bottom right, you
12 see that the red bar there?

13 A. Yes.

14 Q. Can you read what is in the top red bar?

15 A. Yes, I can.

16 Q. What does it say?

17 A. Request a Quote.

18 Q. Have you tried -- when you visited the website, did you
19 click on that button?

20 A. Yes, I did.

21 Q. And what happened?

22 A. It goes to another page that describes who to contact at
23 PilePro for more information or quote or sales of this product.

24 THE COURT: And once again can you just tell me do
25 these screen shots, Exhibit 573 and 574, does this reflect what

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De Mey - direct

1 the website looked like last week when you visited it?

2 THE WITNESS: Yes, sir.

3 THE COURT: OK.

4 Q. And to your knowledge, has anyone ever gotten directed to
5 Skyline by pressing Request a Quote on the PilePro website?

6 A. Not to my knowledge.

7 Q. OK. Now, take a look at the second half of the page, or
8 the second page in the printout of this web page. What appears
9 on that half of the page?

10 A. So here on the left-hand side appears the alternative
11 solutions to the original one that we just clicked. So again
12 if you click on one solution, on the bottom of the page will
13 appear other possible technical solutions that have equivalent
14 metrics.

15 Q. And do you see anywhere on that list any of the Skyline HZM
16 system products?

17 A. Yes.

18 Q. OK. Where are they?

19 A. So, the yellow one, which is highlighted here, but also on
20 the actual website, shows the original solution which was
21 clicked. So in this case it was the HZM 1180M, and it compares
22 that to the other solutions that are technically at least
23 equivalent.

24 Q. And do you see there is a column at the top that's called
25 "available". Do you see that?

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De Mey - direct

1 A. Yes.

2 Q. Under that, what is listed for that Skyline product?

3 A. So for this particular Skyline product it says 16 weeks.

4 Q. And what did you understand that to mean?

5 A. I understand that to be the lead time, which is the
6 delivery time needed between order and final delivery, 16 weeks
7 in this case.

8 Q. And is that an accurate representation of what the lead
9 time is for that Skyline product?

10 A. No, it's not.

11 Q. Based on your experience, what is the lead time for that
12 Skyline product?

13 A. Lead sometimes vary, and we could deliver this material in
14 eight weeks, between eight and 12 weeks. I would say it
15 depends on the specificities of the quantity, the length of the
16 material, the urgency of the job as. As I described before,
17 for urgency matters we could do it much quicker if need be. So
18 the timing is variable. 16 weeks is too long.

19 Q. Let's go back to the first page. Do you see there is some
20 fine print at the bottom of that page?

21 A. I do.

22 Q. Maybe we can blow it up. Take a look in particular at the
23 third sentence beginning with the word "information". Do you
24 see that?

25 A. Yes.

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De Mey - direct

1 Q. Can you read that to the jury, please.

2 A. "Information is taken from the latest known manufacturer
3 catalogs and websites."

4 Q. OK. Are you aware of any Skyline product catalogs that
5 contain lead time information?

6 A. No.

7 Q. Are you aware of -- does Skyline maintain a website?

8 A. We do.

9 Q. Are you aware of anywhere on the Skyline website where
10 Skyline lead time information is published?

11 A. No, we don't publish lead times.

12 Q. How about ArcelorMittal, are you aware of any ArcelorMittal
13 catalog where lead time information is published for the HZM
14 products?

15 A. No, ArcelorMittal does not publish lead times.

16 Q. Does ArcelorMittal maintain a website?

17 A. Yes.

18 Q. Are you aware of anywhere on their website where lead time
19 information is published for their products?

20 A. No.

21 Q. Now let's look at another exhibit, 575. Can you identify
22 this one for the record?

23 A. Yes, I can.

24 Q. What is this?

25 A. This is the HZM 1180 MD-14 on the iSheetPile website.

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De Mey - direct

1 Q. That's the PilePro website?

2 A. Yes.

3 Q. How does this differ from the one we just looked at?

4 A. This one has a different intermediate sheet file section,
5 so in this case it's an AZ 1470, as you can see. And the
6 former one was AZ 19-700. It's a different intermediate sheet
7 level.

8 Q. And is this a screen shot of what you viewed when you
9 visited the PilePro website last week?

10 A. Yes.

11 MR. BADINI: Move to admit 576 and offer -- I'm
12 sorry -- and permission to publish it to the jury.

13 THE COURT: I think it was 575.

14 MR. BADINI: 575. I stand corrected, your Honor.

15 THE COURT: Any objection?

16 MS. GHAVIMI: No objection.

17 THE COURT: Admitted.

18 (Plaintiff's Exhibit 575 received in evidence)

19 Q. OK. Do you see on the second page what availability is
20 published for this HZM product?

21 A. Yes, I do.

22 Q. What is the lead time published for that product?

23 A. It's also 16 weeks.

24 Q. Is it accurate for this product?

25 A. No.

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De Mey - direct

1 Q. OK. Now let's take a look at 576. Sorry I was jumping
2 ahead. Can you identify -- oh, I'm sorry. Before we go to
3 576, staying on 575. Does that also have the Request a Quote
4 button on that page?

5 A. Yes, it does.

6 Q. Now let's go to 576. Can you identify this one for the
7 record?

8 A. So this is another page of the iSheetPile.com website,
9 PilePro's website in which the detail of a product or a
10 solution is shown, in this case the HZM 1180 MD-24/AZ19.

11 Q. And did you view this page in forms shown on 576 when you
12 visited last week?

13 A. Yes.

14 MR. BADINI: Move to admit 576, and permission to
15 publish to the jury.

16 THE COURT: Any objection?

17 MS. GHAVIMI: No objection.

18 THE COURT: Admitted.

19 (Plaintiff's Exhibit 576 received in evidence)

20 Q. And again look at the lead times published for this HZM
21 system on that page. What is that?

22 A. Again, 16 weeks.

23 Q. Is that accurate?

24 A. No.

25 Q. All right. Let's look at 577. Can you identify that for

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De Mey - direct

1 the jury.

2 A. Yes, I can.

3 Q. And what is that?

4 A. It's again a page from the iSheetPile.com website
5 describing the detailed technical specifications of a product,
6 in this case HZM 1180 MD-26 and intermediate sheet pile
7 AZ26-700.

8 Q. Did you view that page, substantially this form, when you
9 went to the website last week?

10 A. Yes.

11 MR. BADINI: Move to admit and publish 577.

12 MS. GHAVIMI: No objection.

13 THE COURT: Admitted.

14 (Plaintiff's Exhibit 577 received in evidence)

15 Q. Now, does that show the lead times for this Skyline
16 product?

17 A. It does.

18 Q. And what is that?

19 A. 16 weeks.

20 Q. Is that accurate?

21 A. No.

22 Q. And does that also include a Request a Quote?

23 A. It does.

24 Q. So I don't have to keep asking you, on every page that you
25 visited of these products, did those pages include a Request a

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De Mey - direct

1 Quote button?

2 A. Every page does or did.

3 Q. Now let's look at Exhibit 579. Can you identify this
4 document for the record.

5 A. It's another page from iSheetPile.com which describes one
6 specific product and its technical details. This product is
7 the AZ 36-7010M.

8 Q. Is this Exhibit 579 a picture of what you saw when you
9 visited the website last week?

10 A. Yes.

11 MR. BADINI: Move to admit 579 and publish to the
12 jury.

13 MS. GHAVIMI: No objection.

14 THE COURT: Admitted.

15 (Plaintiff's Exhibit 579 received in evidence)

16 Q. Now, if you look at the picture on the first page, how does
17 this product differ, if at all, from the products we have just
18 been looking back in terms of screen shots?

19 A. This product is just sheet piles; it's not an HZM solution.
20 In other words, it's not a king pile, the connector and sheet
21 pile; it's only sheet piles.

22 Q. And it's one particular kind of AZ pile, correct?

23 A. Yes.

24 Q. The last exhibit we looked at, 577, can you look at that
25 for a second, maybe the cover page. If you could put that up.

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De Mey - direct

1 Do you see where it says HZM 1180 MD-26/AZ 26-700?

2 A. Yes.

3 Q. Sorry. That was a mouthful. But let's talk about the part
4 after the slash, AZ 26-700. Do you know what that is?

5 A. Yes.

6 Q. What is that?

7 A. It's an AZ sheet pile.

8 Q. So is that sold only as part of the HZM system?

9 A. No.

10 Q. Is it also sold alone?

11 A. Yes.

12 Q. Did you visit -- does the PilePro website have a page for
13 that sheet pile, the AZ 26-700?

14 A. Yes.

15 Q. Did you visit that website last week?

16 A. Yes.

17 Q. That web page, I meant.

18 A. Web page, yes, on this AZ 26-700, yes.

19 Q. What lead time did the website report for that page?

20 A. It says four weeks.

21 Q. Is that accurate?

22 A. No.

23 Q. Why not?

24 A. Because we have them in stock right now, available right
25 here for delivery tomorrow if need be.

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De Mey - direct

1 Q. Did PilePro list on that page any products that were
2 competitive with the AZ 26-700?

3 A. Yes.

4 Q. Can you give me an example?

5 A. The PZC 26.

6 Q. PZC?

7 A. Yes.

8 Q. Who makes the PZC 26?

9 A. The PZC 26 is a product made by Gerdau.

10 Q. Is that that steel company you talked about earlier?

11 A. It is the Brazilian steel company we talked about before,
12 yes.

13 Q. What lead time did PilePro list for that product?

14 A. Two weeks.

15 Q. Do you have any basis to assess whether that is accurate or
16 not?

17 MS. GHAVIMI: Objection. Lack of knowledge.

18 THE COURT: Overruled. Just yes or no.

19 A. Yes.

20 Q. And what basis -- without telling me first whether it's
21 accurate or not, what basis do you have for assessing the
22 accuracy or inaccuracy of that statement?

23 A. Well, that's my job. I am in charge of a steel company
24 that sells this product every day, so I should know what our
25 competitors do on a daily basis. I wouldn't be running the

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De Mey - direct

1 company well.

2 Q. Let me ask a follow-up question. And in that connection,
3 have you gotten access to the information about your
4 competitors' availability and supply schedules?

5 A. Yes.

6 Q. Based on that experience, do you know whether that lead
7 time published with respect to the Gerdau product is accurate
8 or not?

9 MS. GHAVIMI: Objection. Lack of personal knowledge.

10 THE COURT: Sustained.

11 Q. Are you familiar with another Skyline product known as the
12 SKZ 31?

13 A. Yes.

14 Q. What is that?

15 A. SKZ 31 is a cold formed sheetrock pile.

16 Q. And how, if at all, does that differ from the process you
17 described as hot rolling?

18 A. A cold rolling process is in which you take a piece of flat
19 steel and at room temperature, which we call cold rolling, you
20 will roll a piece of steel through a number of rolls and create
21 a shape, also like a Z shape, similar to the hydro sheets,
22 except the interlock is slightly different; it's not as
23 perfect.

24 Q. Did you observe that product on the PilePro website last
25 week?

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De Mey - direct

1 A. Yes.

2 Q. What lead time was listed for that product?

3 A. Eight weeks.

4 Q. Was that accurate?

5 A. No.

6 Q. Why not?

7 A. Several reasons. We have SKZ 31 in stock, and if somebody
8 were to need something that we don't have in stock, we have raw
9 material in stock to be able to make it on demand in a couple
10 days.

11 Q. Are you familiar with a product that is called the
12 Shoreline MSZ 19?

13 A. Yes.

14 Q. What is that product?

15 A. It's also a cold form sheet pile produced by one of our
16 competitors called Shoreline.

17 Q. Did you observe that lead time on PilePro's website?

18 MS. GHAVIMI: Objection, your Honor. Relevance.

19 THE COURT: Overruled.

20 A. Yes.

21 Q. What was it listed as?

22 A. I believe it's four weeks.

23 Q. And do you have any basis to know whether or not that is
24 accurate?

25 THE COURT: Yes or no.

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De Mey - direct

1 A. I have no basis if it's accurate or not.

2 THE COURT: Just yes or no.

3 A. No.

4 Q. Did you observe on the PilePro website products called O
5 pipe products?

6 A. Yes.

7 Q. Do you know what those are?

8 A. Yes.

9 Q. What kind of products are those?

10 A. That is a pipe wall, a continuous wall of pipe that are put
11 together through a specific type of interlock.

12 (Continued on next page)

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GBTHSKY7

De Mey - Direct

1 BY MR. BANDINI:

2 Q. Do you know whether PilePro promotes those O-Pile products?

3 A. Yes, PilePro does.

4 Q. Did you see whether the Web site published lead times for
5 those products?

6 A. Yes.

7 Q. Do you consider those products to be competitive with
8 Skyline's combination wall systems?

9 A. They compete with Skyline's product, yeah.

10 Q. Are you familiar with a particular O-Pile product known as
11 the 2307 O-Pile product?

12 A. Yes.

13 MS. GHAVIMI: Objection, your Honor. Relevance.

14 THE COURT: Overruled.

15 A. Yes.

16 Q. What do you know about that product?

17 A. It's an O-Pile. So it's a pipe combined with a special
18 interlock of a certain diameter and a certain wall thickness
19 combination.

20 Q. Did you observe a lead time reported by PilePro for that
21 product on its Web site?

22 A. Yes.

23 Q. What was it?

24 A. Four weeks.

25 Q. Was that accurate?

GBTHSKY7

De Mey - Direct

1 MS. GHAVIMI: Objection, your Honor. Lack of personal
2 knowledge.

3 THE COURT: Sustained.

4 Q. Do you have any basis -- let me rephrase.

5 Do you have any basis for determining whether or not
6 that lead time is accurate?

7 A. Yes.

8 Q. What is your basis?

9 A. I have -- first of all, I'm in this business every day.

10 Second of all, I have run operations that make pipe, and this
11 would require pipe to be produced, which means raw material has
12 to be bought from a steel mill, which takes time. Then the
13 pipe has to be produced and the interlock has to be welded to
14 the pipe, all which takes much more time than four weeks. My
15 personal experience tells me this.

16 Q. Are lead times related to the size of the job?

17 A. Absolutely.

18 Q. In what way?

19 A. You may have inventory available for smaller jobs; and,
20 therefore, the lead times can be very, very short. For bigger
21 jobs, you may not have everything that is needed for this one
22 job; and, therefore, you may have to order from a steel mill
23 and wait. So lead times are very dependent on the size of the
24 actual job or the volume of material you need for it.

25 Q. Has Skyline, to your knowledge, ever complained to PilePro

GBTHSKY7

De Mey - Direct

1 that PilePro is posting what you viewed as inaccurate lead
2 times for your products?

3 A. Yes, we have.

4 Q. Were you involved in any such complaints?

5 A. Yes. We have had several conversations with PilePro for
6 that, yeah.

7 Q. What was said?

8 A. Well, we asked PilePro to not post any lead times and also
9 to take out our products from this list.

10 Q. What -- who, in particular, at PilePro were these
11 conversations with?

12 A. With Mr. Wendt.

13 Q. And what did PilePro do in response to that?

14 A. Nothing. Nothing.

15 Q. Now, we talked a little bit about the request-to-quote
16 button. I only have a couple more questions about that.

17 You said -- I think you read -- I'm sorry. You didn't
18 read. You said that something popped up with respect to
19 PilePro when you clicked on "request to quote"?

20 A. Yes.

21 Q. Is that right?

22 A. Yes.

23 Q. Was there a phone number there?

24 A. There was a phone number, yes.

25 Q. Was that a Skyline phone number?

GBTHSKY7

De Mey - Direct

1 A. No, sir.

2 Q. Okay. Is PilePro authorized to quote any Skyline product?

3 A. No.

4 Q. Is PilePro authorized to sell any Skyline product?

5 A. No.

6 Q. Did Skyline ever complain to PilePro with respect to the
7 request-to-quote button?

8 A. Yes.

9 Q. What was the complaint?

10 A. We asked to take it out.

11 Q. What was PilePro's response?

12 A. No answer. No was the answer.

13 THE COURT: I'm sorry. Say that again.

14 THE WITNESS: They said no or didn't do it.

15 Q. Have the -- how have the posting of these lead times
16 affected Skyline?

17 A. We believe it has, yes.

18 Q. In what way?

19 A. Engineers will look at those lead times to make a decision,
20 as I explained before, whether a job should be designed in one
21 product or another. And by posting Skyline's lead time, in all
22 the examples we saw, in a negative light compared to any other
23 solution, we believe that engineers would have changed their
24 minds and therefore maybe preferred other products ahead of
25 Skyline's products.

GBTHSKY7

De Mey - Cross

1 Q. Does Skyline believe that the request to quote has impacted
2 Skyline?

3 A. Yes, we believe that because of the fact that the request
4 to quote did not divert any of these requests towards Skyline
5 but towards PilePro. PilePro could easily talk to that
6 customer and try to convert him into using a PilePro-preferred
7 type solution, away from our solutions.

8 MR. BANDINI: No further questions at this time. Your
9 witness.

10 THE COURT: Cross-examination.

11 MS. GHAVIMI: Your Honor, may I approach the witness?

12 THE COURT: You may.

13 CROSS-EXAMINATION

14 BY MS. GHAVIMI:

15 Q. Good afternoon, Mr. De Mey.

16 A. Good afternoon.

17 Q. I'd like to start with -- I don't know if you have in front
18 of you the joint stipulated facts. Are they in the binder from
19 the plaintiff's examination?

20 A. I'm not sure. No, I don't think they are.

21 MS. GHAVIMI: If I could approach the witness, your
22 Honor?

23 THE COURT: You may.

24 Q. This is previously entered into evidence as
25 Plaintiff's Trial Exhibit 585. Do you see that document in

GBTHSKY7

De Mey - Cross

1 front of you?

2 A. I do.

3 Q. Okay. Thank you.

4 THE COURT: I think it's 584, counsel.

5 MS. GHAVIMI: Oh, I'm sorry, 584.

6 Q. And I apologize. I do not have it to publish to the jury.
7 I'll just have to read it out for you.

8 THE COURT: You're not going to read the whole thing,
9 I assume?

10 MS. GHAVIMI: No, no, I'm just going to read a couple
11 of them.

12 Q. If you could look on the first page for me, Mr. De Mey.
13 Look at No. 13. Do you see where I am? It's on the first
14 page -- I'm sorry. Looking at the wrong one. The second page.
15 It's in the middle of the page.

16 A. Yes, I see that.

17 Q. Could you read that for me.

18 A. "HZM has been a registered trademark of ArcelorMittal in
19 the United States only since December 2, 2014."

20 Q. Now, do you understand that this is a fact that both
21 parties have agreed to and the Court has entered as a true and
22 accurate statement?

23 THE COURT: Sustained.

24 A. I understand that, yes.

25 THE COURT: No, I sustained the objection. So don't

GBTHSKY7

De Mey - Cross

1 answer it.

2 THE WITNESS: Oh, sorry.

3 THE COURT: Thank you. The jury will disregard that
4 last answer.

5 Next question.

6 BY MS. GHAVIMI:

7 Q. Now, you said that -- I believe it was plaintiff's
8 Exhibit 306. If you could turn to that.

9 A. I'm looking. Excuse me. How do I find this in here?

10 Q. It's in the plaintiff's binder that you were using with.

11 THE COURT: Mr. De Mey, I think it's in the other
12 binder.

13 THE WITNESS: Oh, this document here?

14 Q. No, it's in the binder you were using with Mr. Bandini.

15 A. Oh, sorry.

16 Q. It's behind Tab No. 306.

17 A. 306. Sorry. Yes.

18 Q. Could you please tell the jury again what this document is.

19 A. This document is our Technical Product Manual from Skyline
20 Steel.

21 Q. Could you read what year it's from.

22 A. Edition 2014.

23 Q. Okay. Could you turn to the very last page.

24 A. Yes.

25 Q. If you could open up Plaintiff's Exhibit 306.

GBTHSKY7

De Mey - Cross

1 If I have permission to publish this to the jury, your
2 Honor?

3 THE COURT: You may.

4 Q. If you could please go to the last page. Right at the very
5 bottom, does it list a date for the edition?

6 A. I believe it does. March '14 edition, so 3/14 edition.

7 Q. Is this before or after ArcelorMittal's HZM trademark was
8 registered?

9 MR. BANDINI: Objection.

10 THE COURT: Overruled.

11 A. I don't know.

12 Q. Is March 2014 before or after December 1, 2014?

13 A. It would be before.

14 THE COURT: I think we can all agree on that.

15 Q. And I think you also testified with regard to this document
16 it was blown up -- I apologize to the jury. On this last page,
17 it says HZM and AMLoCor are registered trademarks of
18 ArcelorMittal. Is that accurate?

19 A. Yes.

20 Q. Do you see that it says HZ and then a little "R" up at the
21 top dash M?

22 A. Uh-huh, I do.

23 Q. Do you understand what the little "R" at the top means?

24 A. I believe it means registered trademark.

25 Q. Okay. Why is it that the "R" is after the HZ?

GBTHSKY7

De Mey - Cross

1 MR. BANDINI: Objection.

2 THE COURT: What's your understanding of why the "R"
3 is after the HZ?

4 A. I have no idea. I don't know.

5 Q. Couldn't it be that it's HZ trademark?

6 THE COURT: Sustained.

7 Q. Does Skyline have a license to use the HZM trademark?

8 A. Yes.

9 Q. Is that license written?

10 A. It's part of our contract, yes.

11 Q. Does Skyline pay royalty?

12 A. No.

13 Q. Does Skyline have a license to use the ArcelorMittal
14 trademark?

15 A. We -- no, no, we use -- we can trademark their products.
16 We don't -- we're not an ArcelorMittal company, so we will not
17 use the name ArcelorMittal. We can sell an ArcelorMittal
18 product.

19 Q. So the fact that ArcelorMittal is written here is not
20 pursuant to a license?

21 A. That's not what I'm saying. You asked me if we could use
22 the name ArcelorMittal in our documents. Yes, we can, in a
23 product, but we are not an ArcelorMittal company.

24 Q. My question is you have express permission from
25 ArcelorMittal to use their name?

GBTHSKY7

De Mey - Cross

1 A. Yes.

2 Q. Is that express permission in a writing, a document?

3 A. Yes, same agreement, same contract.

4 Q. But you don't pay any royalty for that?

5 A. No.

6 Q. Is this Exhibit 306, this 2014 catalog, was this a catalog
7 in use when PilePro sent the Madonna letter?

8 A. I believe it was, yes. Sorry, that wouldn't be possible,
9 no.

10 THE COURT: Sorry. You need to --

11 A. Okay. I meant to say I thought it was, but this is a 2014
12 edition made in March, it cannot be because the letters were
13 sent in 2013. So, no, the answer is no.

14 Q. So there was a previous version?

15 A. I assume there was, yes, and I know there is.

16 Q. Was there a version in August of 2013 in use?

17 A. Yes.

18 Q. Okay. I'd like to take that document that has the clip on
19 it. Do you recognize that document?

20 A. Yes.

21 Q. If you could put up on the screen Plaintiff's Exhibit 305.

22 MR. BANDINI: Your Honor, we were not given a copy of
23 305.

24 THE COURT: I think it's your exhibit.

25 MS. GHAVIMI: It's your exhibit.

GBTHSKY7

De Mey - Cross

1 MR. BANDINI: Oh. I apologize to defense. Objection
2 withdrawn.

3 BY MS. GHAVIMI:

4 Q. Is this a document that was created by Skyline Steel in the
5 ordinary course of business?

6 A. Yes.

7 Q. You recognize this document?

8 A. I do.

9 Q. Is this a true and accurate copy of the document -- of the
10 2013 catalog, as you recall?

11 A. As I see the front page, I would assume yes.

12 MS. GHAVIMI: Your Honor, I move Plaintiff's Exhibit,
13 I believe it's, 80 -- 803 into evidence at this time. Request
14 permission to publish it to the jury.

15 THE COURT: It's 305.

16 MS. GHAVIMI: Oh, 305, sorry.

17 THE COURT: Any objection?

18 MR. BANDINI: No objection.

19 THE COURT: Admitted.

20 (Plaintiff's Exhibit 305 received in evidence)

21 BY MS. GHAVIMI:

22 Q. Could you turn to the last page of this document.

23 A. Yes.

24 THE COURT: You'd like it published?

25 MS. GHAVIMI: Publish it to the jury.

GBTHSKY7

De Mey - Cross

1 Q. If you could turn to the last page. Oh, I guess the
2 electronic version I have does not have the --

3 THE COURT: All right. Why don't you proceed with
4 your question.

5 Q. Does it have a date on the back?

6 A. Yes.

7 Q. What is that date?

8 A. 8/13 edition.

9 Q. So is this -- where would Skyline have disseminated this
10 document?

11 A. To engineers, customers.

12 Q. Would Skyline have put this catalog on its Web site?

13 A. Yes.

14 Q. Would there have been another catalog also on Skyline's Web
15 site at the same time, or would this have been the only
16 version?

17 A. Well, this is the only version of all products. It could
18 be specific brochures for specific products, yes; but covering
19 everything, yes, it's this.

20 Q. Okay. So if you could turn to the first -- oh.

21 So is this the catalog that was in the public eye on
22 the date that PilePro sent the Madonna letter?

23 A. If this is August 2013, then it's not possible, because the
24 letter was sent June 20; right?

25 Q. The date that --

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De Mey - Cross

1 A. When was the date? Do you mind? Let me check this.

2 THE COURT: Mr. De Mey, you can't mumble --

3 THE WITNESS: I can't mumble.

4 THE COURT: -- because no one will understand what you
5 say.

6 THE WITNESS: Let me check, if you don't mind, the
7 dates for a second.

8 Yes, it would be.

9 THE COURT: It would be what?

10 THE WITNESS: It would be, indeed, the document that
11 is in circulation at the time of the Madonna letter.

12 BY MS. GHAVIMI:

13 Q. Would this be the document that is in circulation at the
14 time that Skyline sued PilePro in this case?

15 A. I think so, yes.

16 Q. Would this be the document that was in circulation at the
17 time the infringement warning was placed on the iSheetPile Web
18 site?

19 A. I believe it is.

20 Q. Would this be the document at the time in circulation at
21 the time that Skyline -- let me rephrase that.

22 Would this be the document that was in circulation at
23 the time you viewed the infringement warnings on the iSheetPile
24 Web site that you testified to earlier?

25 A. Yes.

GBTHSKY7

De Mey - Cross

1 Q. If you could turn to the first yellow flag. I believe that
2 is page 6.

3 A. Yes.

4 Q. If you could look to the bottom, do you see a Web site
5 address there?

6 A. I can see it, yes.

7 Q. Could you read that for me.

8 A. www.PilePro.com.

9 MR. BANDINI: I'm sorry, counsel. What Bates number
10 page are you on, please? We have a different page 6, so -- is
11 this the page?

12 I'm sorry, your Honor.

13 MS. GHAVIMI: Yes. Could I use that one?

14 MR. BANDINI: Okay.

15 MS. GHAVIMI: For the record, the Bates is
16 SKYLN0006042.

17 Q. Have you ever gone to the --

18 THE COURT: Can you bring up that page on the screen
19 for everybody else.

20 I don't think that's the same page. Why don't we
21 proceed without the screen since that's not working for us. Go
22 ahead.

23 MS. GHAVIMI: Can I -- okay. We don't need it
24 published to the jury.

25 THE COURT: That's good.

GBTHSKY7

De Mey - Cross

1 Q. Have you ever gone to the PilePro Web site?

2 A. Yes, I have.

3 Q. Have you seen a link to iSheetPile there?

4 A. Yes, I have.

5 Q. Have you clicked on that link?

6 A. I have.

7 Q. Do you know how many other times PilePro's Web site appears
8 in this catalog?

9 A. I don't know.

10 Q. We can count them.

11 A. We could.

12 Q. I can represent to you it's --

13 THE COURT: Sustained.

14 Q. Can you turn --

15 THE COURT: Counsel, the document's in evidence, so
16 unless the witness knows, let's just leave it there for now.

17 Q. Let's go to the last page again. Is there another Web site
18 listed on that page?

19 A. SkylineSteel.com.

20 Q. So if one were to look at your catalog and see the PilePro
21 Web site, they could potentially visit your catalog and be
22 directed to the PilePro Web site?

23 MR. BANDINI: Objection.

24 THE COURT: Sustained as to form.

25 Q. In your opinion, if someone were to view the PilePro --

GBTHSKY7

De Mey - Cross

1 were to view this catalog and see the PilePro Web site, would
2 that be an endorsement of PilePro?

3 MR. BANDINI: Objection.

4 THE COURT: Sustained.

5 Q. Could you turn back to Plaintiff's Exhibit 11.

6 A. Yes, I can.

7 MS. GHAVIMI: Could we publish that to the jury?

8 Q. Could you turn to the first page -- not the cover, but I
9 guess the second page.

10 A. Yes, I can.

11 Q. Do you see in the third column, the third full paragraph
12 down?

13 A. Yes.

14 Q. Could you read that for the jury.

15 A. I can.

16 "In 2007, we launched the final research project.
17 Many technical solutions were analyzed and" --

18 Q. I'm sorry to stop you. I think we are on the different
19 one. I'm looking at the ArcelorMittal HZM steel wall system,
20 2013?

21 A. True.

22 Q. Is that not Plaintiff's Exhibit --

23 A. That's what I'm reading. Right here, first page you said,
24 second column, third paragraph.

25 Q. I'm sorry. I said third column.

GBTHSKY7

De Mey - Cross

1 A. Oh, sorry.

2 Q. Where it starts "less than one year."

3 A. Yep.

4 Less than one year later, in 2008, ArcelorMittal was
5 proud to supply just one time the first HZM system for a huge
6 project in northern Germany, a vast challenge mastered through
7 an excellent collaboration between several departments in
8 Luxembourg, RND, the rolling mill, the technical, and the sales
9 departments.

10 Q. Could you tell me what project in Germany that refers to?

11 A. Yes.

12 Q. Could you tell the jury the name of that project.

13 A. I think it's Bremerhaven.

14 Q. Bremerhaven?

15 A. Yeah.

16 Q. Are you sure that doesn't refer to the JadeWeser Port?

17 A. JadeWeser Port, J-a-d-e-r W-e-s-e-r port.

18 Q. Could you explain to the jury a little bit about the
19 JadeWeser project?

20 A. Not much except it's a big project.

21 Q. Okay. That is an HZM system used in that project; isn't
22 that correct?

23 A. I think it is, yes.

24 Q. Okay. Didn't that HZM system in the JadeWeser Port fail
25 332 times?

GBTHSKY7

De Mey - Cross

1 MR. BANDINI: Objection.

2 THE COURT: Sustained.

3 Next question, counsel.

4 Q. Didn't the connectors in the HZM system declutch in the
5 JadeWeser Port 332 times?

6 MR. BANDINI: Objection.

7 THE COURT: Sustained.

8 New question, counsel.

9 Q. Isn't it possible that engineers would not recommend the
10 HZM system because of Arcelor's reputation and not because of
11 an infringement warning on the iSheetPile Web site?

12 MR. BANDINI: Objection.

13 THE COURT: Sustained.

14 Q. Do engineers talk to each other in this business?

15 A. I don't know. I assume yes.

16 Q. You testified you talked to engineers; isn't that true?

17 A. That wasn't your question. Your question was if they talk
18 to each other. I don't know. We talk to them.

19 Q. Do engineers tell you what they hear about your
20 competitors?

21 A. They may, yeah.

22 Q. Do engineers tell you why they select certain products over
23 others?

24 A. Sure, yeah.

25 Q. Is one of the reasons engineers select products the

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De Mey - Cross

1 reputation of a company?

2 A. Yeah, could be, yeah.

3 Q. Isn't it true that engineers want a product to actually
4 work?

5 A. They do.

6 Q. Wouldn't that be a reason why engineers would select a
7 product?

8 A. Absolutely.

9 Q. Wouldn't that be more important than a lead time in
10 selecting a product?

11 MR. BANDINI: Objection.

12 THE COURT: Based on your experience and conversations
13 you testified to earlier, would engineers as part of your
14 experience -- what is your view of that?

15 THE WITNESS: They would take reputation into
16 consideration. I don't know and I could not weigh whether lead
17 time, reputation, availability, all these things have a certain
18 weight. They want to have a product that is of high quality,
19 available for them. Reputation could be something in their
20 decision-making process. I don't know how much.

21 Q. So you just said you don't know how much reputation would
22 take into account for lead times, but didn't you testify
23 earlier that lead times were the major reason why engineers
24 would decide on a product?

25 A. Sure. What I said was I don't know how much reputation

GBTHSKY7

De Mey - Cross

1 would weigh in their final factor. Their decision-making is a
2 quality product available for their jobs. Whether reputation
3 of the company that sells it is important or not, it could be.
4 I don't know how much.

5 Q. What about a reputation of a product actually working in
6 the field?

7 A. They would want to see a product that works, yes, that's
8 right.

9 Q. Wouldn't that be more important than a lead time in
10 determining whether to select a product?

11 A. I don't know. Depends what happened with -- what the
12 reputation is all about. It's too vague. I mean, it's too
13 vague. The reputation could be all different directions.

14 Q. So you're telling me it's vague as to whether a product
15 won't work or not? That's vague to you?

16 A. Yes, that's vague to me.

17 Q. Okay. Could maybe -- is there a way you could make it more
18 clearer as to what a good reputation of a product is versus a
19 bad reputation of a product?

20 A. Sure, I can. So an example could be is a product produced
21 by a highly prudent production process or not. That's a
22 reputation. Is the company mistreating its employees or not?
23 That's a reputation. I don't know if that's a decision-making
24 process that will weigh in the engineer's mind. It may very
25 well be. I don't know.

GBTHSKY7

De Mey - Cross

1 Q. Okay. In this catalog, how many of these products are
2 actually made in the United States?

3 A. In this catalog that you referred to?

4 Q. Yes.

5 MR. BANDINI: Objection.

6 THE COURT: Sustained.

7 Q. You testified that lead times on iSheetPile Web site are
8 false because some of the products are in stock right now; is
9 that correct?

10 A. I did, yes.

11 Q. But wouldn't you agree that if a product is not made in the
12 United States, that would impact the lead time?

13 A. It would, yes. Also if it's made in the United States.

14 Q. I'm sorry. What did you say?

15 A. Whether it's made in the United States or not, lead time is
16 impacted. Lead time would be impacted.

17 Q. If Skyline doesn't publish its lead times, how is anyone to
18 know what's an accurate lead time is?

19 A. We put lead times on our quotes.

20 Q. Did you ever provide those quotes to PilePro?

21 A. No.

22 Q. So you only provide those quotes to your customers?

23 A. Sure, yes.

24 Q. So only your customers are allowed to know what an accurate
25 lead time is?

GBTHSKY7

De Mey - Cross

1 MR. BANDINI: Objection.

2 THE COURT: Sustained.

3 Q. If you could turn to Plaintiff's Exhibit 19. I think
4 that's the next in your binder.

5 A. Yes.

6 Q. So could you just help the jury remember, this is an HZM
7 product or an HZM system? I'm sorry. I don't recall.

8 A. It shows the HZM system with its individual components.

9 Q. So what is an HZM product?

10 A. An HZM product -- an HZM, as known in the market, would be
11 a combination of a beam, a connector, and a sheet pile.

12 Q. So when somebody refers to an HZM product, what do you
13 interpret that to mean?

14 A. It would mean the entire wall of all components, including
15 all components as I described.

16 Q. Including all components as you described?

17 A. Yes, uh-huh.

18 Q. So an HZM --

19 THE COURT: You have to say yes or no.

20 THE WITNESS: Sorry, yes.

21 THE COURT: And, Ms. Ghavimi, do you want this, since
22 it's on the screen, published to the jury?

23 MS. GHAVIMI: Yes.

24 BY MS. GHAVIMI:

25 Q. So if one were to, say, use the term "an HZM product," you

GBTHSKY7

De Mey - Cross

1 would not think of just a connector?

2 A. I would not think of just a connector, no.

3 Q. And if one were to say an HZM product, you would not think
4 of just AZ 14-770, would you?

5 A. No, I wouldn't.

6 Q. So if you were to look at AZ 14-770 on the iSheetPile Web
7 site, you would not describe that as an HZM product, would you?

8 A. No, I would not.

9 Q. And if you were to view the RZD/U connector on the
10 iSheetPile Web site, you would not consider that an HZM
11 product, would you?

12 A. Well, I would. Yes, I would, because the product as such
13 has no other use than being used in a combi wall like this.

14 Q. An RZD connector has no other use than being used in an HZM
15 system?

16 A. Yes, or similar solution, yes.

17 Q. It cannot be used with a different kind of sheet pile?

18 A. Yeah, you're right, it could be used with a different brand
19 of sheet pile, yes. Sorry. That's true. You're right. It
20 could be used with a different brand of sheet pile, yes.

21 Q. So my original question was you would not consider an RZD/U
22 connector, looking at it on the iSheetPile Web site, as an HZM
23 product, would you?

24 MR. BANDINI: Objection. Asked and answered.

25 THE COURT: Overruled.

GBTHSKY7

De Mey - Cross

1 A. Correct.

2 Q. So you mentioned that you viewed the iSheetPile Web site
3 when the warning, infringement warning, that is shown here on
4 Exhibit 19 was placed, initially placed; is that correct?

5 A. Yes.

6 Q. Do you recall that?

7 A. Yes.

8 Q. So why did you state earlier it was up there two months
9 ago?

10 A. Unfortunately, this process takes forever, and so we've
11 been in discussion for months and months and months, and I'm
12 sorry. It's been a long time, a lot of documents. I made a
13 mistake. And it's not there anymore, which makes it even more
14 complex, when was it still there and when not anymore.

15 Q. You don't have any copies of it as it was, do you?

16 THE COURT: Sustained.

17 Q. Do you recall looking through the entire Web site as it
18 existed when the infringement warning was placed?

19 A. Page by page by page, you mean?

20 Q. Yes.

21 A. Not page by page by page.

22 Q. What pages did you look at?

23 A. I don't remember. Pages of all -- a number of combinations
24 of products.

25 Q. Did you look at the RZD/U connector page alone?

GBTHSKY7

De Mey - Cross

1 A. I don't know.

2 Q. Did you look at the AZ 1770 page alone?

3 A. I don't know. I could have, yes.

4 Q. Did you see an infringement warning?

5 A. Yes.

6 Q. I'm going to turn to Plaintiff's Exhibit 280.

7 A. Yes.

8 Q. You recall this document?

9 A. I do.

10 Q. Did you see this document at the time it was sent to
11 Skyline?

12 A. Yes, it was forwarded to me.

13 THE COURT: Can you remind us what Plaintiff's
14 Exhibit 280 is.

15 THE WITNESS: Yes. The Exhibit 280 from the
16 plaintiff's side is a letter from John Madonna to Matt
17 McLaughlin, who is our salesperson on the West Coast, and he
18 forwarded it to me and our CFO.

19 THE COURT: Is that an e-mail attaching the --

20 THE WITNESS: E-mail forwarding included attachment.

21 THE COURT: All right.

22 BY MS. GHAVIMI:

23 Q. Before I publish it to the jury, your Honor, do you see the
24 second sentence?

25 A. I do.

GBTHSKY7

De Mey - Cross

1 Q. Was there a discussion internally about the second
2 sentence?

3 MR. BANDINI: Objection.

4 THE COURT: Sustained.

5 MS. GHAVIMI: Your Honor, I'd like to publish this to
6 the jury.

7 THE COURT: You may.

8 BY MS. GHAVIMI:

9 Q. Now, you testified earlier that -- about the last
10 paragraph.

11 A. Yes.

12 Q. Just to recall for the jury that this -- and I apologize.
13 I don't recall exactly what you said.

14 THE COURT: Ms. Ghavimi, just ask your question.

15 Q. Yes. This letter says: Please respond immediately should
16 this information have any effect on the current installation of
17 Skyline --

18 THE COURT: Ms. Ghavimi, number one, everybody's
19 looking at it. It's on the screen. Number two, you can't read
20 that quickly or the court reporter can't keep up.

21 MS. GHAVIMI: I apologize.

22 THE COURT: So just ask the question.

23 Q. This last question caused concern at Skyline; is that
24 correct?

25 A. It did, yes.

GBTHSKY7

De Mey - Cross

1 Q. And could you please remind the jury why it caused you
2 concern.

3 A. The concern was, as explained before, was we already had
4 delivered steel, and some of the steel was already installed or
5 was being installed in the ground.

6 Q. Isn't it true you had another delivery on the way, though?

7 A. It's possible, yeah.

8 Q. Did you make any effort to stop that delivery in response
9 to this letter?

10 A. No, I don't think -- I don't believe we did.

11 Q. So you still continued on and delivered more steel even
12 after you received this letter to John Madonna?

13 A. We have an agreement with a customer and engagement to a
14 customer to supply steel.

15 Q. So it didn't cause you that much concern?

16 MR. BANDINI: Objection.

17 THE COURT: Overruled.

18 A. Sure, it did give us concern. One is independent of the
19 other.

20 Q. Did you complete the delivery of the steel for this entire
21 project to Madonna?

22 A. I believe we did.

23 Q. Did Madonna pay you for this project?

24 A. Yes, they did.

25 Q. Did they pay you in full for this project?

GBTHSKY7

De Mey - Cross

1 A. Yes, late, but yes.

2 Q. How much did they pay you in total for this project?

3 A. I don't remember. 2 million some sort, little more.

4 Q. Wasn't it \$2.6 million?

5 A. Possible, yes.

6 THE COURT: Mr. De Mey, just keep your voice up, if
7 you could.

8 THE WITNESS: Yes.

9 Q. How much did Madonna ask you to pay for their attorney's
10 fees?

11 A. Less than \$5,000, as stated.

12 Q. And I believe you were afraid you'd have to rip up the
13 whole project out of the ground; is that correct?

14 A. Possibly, yes.

15 Q. But isn't it true that that's -- let me rephrase that.

16 Have you ever had to do that on a project?

17 A. We haven't done it, no. That doesn't mean it's not
18 impossible.

19 Q. Have you ever known of it to happen on a project?

20 A. I don't recall.

21 Q. Has Skyline received infringement letters from other people
22 in its experience as a business?

23 MR. BANDINI: Objection.

24 THE COURT: Overruled.

25 A. I don't think so, no.

GBTHSKY7

De Mey - Cross

1 Q. Has Skyline ever received letters threatening lawsuits
2 before?

3 A. Has Skyline ever received letters?

4 Q. Letters threatening lawsuits previously regarding
5 construction contracts?

6 A. No, not like this, I don't think.

7 Q. Could you explain that "not like this."

8 A. Well, here we deliver the product, and PilePro contacts
9 directly our customer saying that there will be consequences
10 for possibly legal litigation and legal cost if they continue
11 using this product line. We've never had something like this
12 that we sold or produced, no.

13 Q. Is Skyline a sophisticated corporation?

14 THE COURT: Sustained.

15 Q. How many projects does Skyline install a year?

16 A. Plenty. I don't know. Couple thousand.

17 Q. A couple thousand?

18 A. Yes.

19 Q. And what are the -- how much does each project cost? I'm
20 sorry. How much does Skyline make on each project?

21 MR. BANDINI: Objection.

22 THE COURT: Sustained.

23 Q. Skyline is installing thousands of projects a year, and you
24 have never received an infringement letter before?

25 A. Yes, sure.

GBTHSKY7

De Mey - Cross

1 Q. Okay. You never received a letter threatening suit from a
2 contractor, a disgruntled customer?

3 A. But not -- not patent related, not something --

4 Q. Any kind?

5 A. Oh, of course. Okay. Maybe I misunderstood your question
6 before, and I apologize for that.

7 In your context that you describe now, contractors
8 will all the time send letters possibly suing you if you
9 deliver late, if you deliver the wrong material, if something
10 happens on the job site you could be involved in, yeah,
11 absolutely, which is why we thought this was very important.
12 If any possible damages would be here, we would be liable for
13 liquidated damages, late delivery would be a huge problem, and
14 with a huge possible legal bill and litigation with our own
15 customer.

16 Q. Is Skyline familiar with the Miller Act?

17 THE COURT: Yes or no?

18 A. I'm not.

19 Q. You testified that the AZ wall sells in the U.S. ten times
20 more than the HZM; is that correct?

21 A. Yes.

22 Q. That -- and I believe I had this -- this is what you said.
23 That the sales without the HZM were 100 to 150 million per year
24 from 2013 to 2015; is that correct?

25 A. Yes.

GBTHSKY7

De Mey - Cross

1 Q. So what were the sales of the HZM during 2013 to 2015?

2 A. Do the math. Between 10 and 15 million, depending on the
3 year. One year could be five; one year could be 15 or 20,
4 depends. On average between 10 and 15 million per year.

5 Q. I'm sorry. I'm not a math person. So that's the
6 percentage of that in your business, sales of HZM?

7 MR. BANDINI: Objection.

8 THE COURT: Sustained.

9 Q. So isn't it true that to build a typical port, you have to
10 use a combi wall system?

11 A. No, that's not true.

12 Q. Why is that not true?

13 A. Because it's not.

14 Q. So to build a port to sustain a sea wall, you can use an
15 AZ --

16 A. Absolutely.

17 Q. -- wall alone?

18 A. Yes.

19 Q. Okay.

20 THE COURT: Ms. Ghavimi, I assume we can take down
21 Plaintiff's Exhibit 280?

22 MS. GHAVIMI: Yes.

23 THE COURT: All right.

24 MS. GHAVIMI: Your Honor, I have about an hour more.
25 I don't know --

GBTHSKY7

De Mey - Cross

1 THE COURT: You have about 12 minutes more today.

2 MS. GHAVIMI: Okay.

3 THE COURT: Use that up, please.

4 Q. Did you ever guarantee lead times in your contracts?

5 A. Once we sign a contract with a customer, we will deliver on
6 time.

7 Q. But I think you said that, you know, you work with
8 customers for unforeseen situations that may delay deliveries;
9 isn't that correct?

10 A. No, I said accelerate deliveries.

11 Q. What if there is an unforeseen delay? Do you reimburse the
12 customer for that?

13 A. Depends on the situation.

14 Q. Okay. Isn't it true that projects typically have serial
15 deliveries?

16 A. Depends on the job.

17 Q. Okay. What is the size of a typical project for Skyline?

18 MR. BANDINI: Objection.

19 THE COURT: Sustained.

20 Q. Did the Madonna project have serial deliveries?

21 A. I think it did, yes.

22 Q. How long did it take from the beginning to end to deliver
23 the product to Madonna?

24 A. I don't know. I'm sure you have the documents.

25 Q. Didn't it take longer than 16 weeks?

GBTHSKY7

De Mey - Cross

1 A. I don't know.

2 THE COURT: Mr. De Mey, what is your understanding?
3 How are you using the term "serial deliveries"? Could you just
4 explain what that means.

5 THE WITNESS: Well, I don't think I was using it, but
6 I think as I understood it is deliveries could be done, if it's
7 by a vessel, could be coming at once, entire thing; it could be
8 coming in parts and pieces, a function of vessel availability
9 or room available or time available or urgency of the job. So
10 there could be partial shipments possibly. There could be
11 truck delivery by a very small quantity.

12 So in the function of the job, it could be everything
13 or could be just one-tenth or a 20th of the job. So there's no
14 black or white. There's several solutions possible.

15 Q. So if the timing of a delivery varies so much, how can you
16 say that any one depiction of a lead time is accurate or
17 inaccurate?

18 A. Because what matters is the starting time.

19 Q. So your interpretation of lead time as presented on the
20 iSheetPile Web site is what?

21 A. It would be, one, can you start delivering material that
22 will keep up with the speed in which the contractor will use
23 it.

24 Q. Is that statement listed anywhere in the iSheetPile Web
25 site?

GBTHSKY7

De Mey - Cross

1 A. That's how the entire industry would use it or see it.

2 Q. The entire industry? Do you speak for the entire industry?

3 A. I don't speak for the entire industry. That's how I would
4 assume everybody understands it, yes.

5 Q. Isn't it also true that a larger shipment, whether serial
6 deliveries or not, would take a longer time to deliver?

7 A. Not necessarily, no. Yeah, if you need one truck, yes, it
8 could be delivered quicker. But whether you buy 200 ton or 400
9 ton or 500 ton of steel, it could be all arriving at the same
10 time because the production process in the steel mill is almost
11 similar, whether it's 200 tons or 500 tons.

12 Q. Are those caveats listed on iSheetPile Web site?

13 A. No, as I said before, there's no volume or any reference to
14 anything.

15 Q. Are you sure?

16 A. I believe it is, yes.

17 Q. Okay. Can we turn to Plaintiff's Exhibit 574.

18 A. Yes.

19 MS. GHAVIMI: If I could publish this to the jury,
20 your Honor?

21 THE COURT: You may.

22 Q. Okay. What is this product shown here?

23 A. HZM 1180M, etc.

24 Q. Is this an HZM product?

25 A. Yes.

GBTHSKY7

De Mey - Cross

1 Q. If you could turn to the second page --

2 A. I can.

3 Q. -- where it's highlighted.

4 A. Yes.

5 Q. I think the ArcelorMittal HZM 1180M D-12, AZ 19-700, I
6 believe you said has available 16 weeks. You previously stated
7 that's incorrect?

8 A. I did.

9 Q. Okay. Do you see there under the column that says weight,
10 and it says 68.41. Do you see that?

11 A. I see that, yes.

12 Q. Up there it says "pounds per feet squared." What is
13 68.41 pounds per feet squared, I guess, to a layman?

14 A. It means what is the weight of the steel used to cover a
15 square footage of wall, of barrier wall or wall, you're
16 building.

17 Q. Okay. And over on the right-hand side -- well, then the
18 second column says: Bending moment capacity. Could you
19 explain that to us.

20 A. That is the strength of the solution and the capacity that
21 it has or the force or weight it can take. The load it can
22 carry is probably the better term. The higher the number, the
23 stronger the solution.

24 Q. So doesn't this describe for a certain weight and poundage
25 amount of steel, that's how long it will take to deliver on

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De Mey - Cross

1 average?

2 A. No, that's not what it says.

3 Q. If you could look at this small writing down here where it
4 says, "Sections listed above," I believe it was blown up in the
5 previous questioning.

6 A. Yes.

7 Q. Could you read the last two sentences for the jury.

8 A. "Section displayed are thought to be relevant and available
9 for delivery and use in the U.S. market within the availability
10 stated in sufficient quantities for a typical job. Please
11 inquire with the manufacturer for actual and specific
12 availability."

13 Q. So that's telling the person who views it to inquire with
14 the manufacturer; right?

15 A. In small letters, yes.

16 Q. But it's still telling them?

17 A. Yeah, it is.

18 Q. If you could look right over to the right where you see the
19 words "manufacturer"?

20 A. Yes.

21 Q. Who is listed underneath that?

22 A. ArcelorMittal.

23 Q. And then it says "distributor." Who's listed underneath
24 that?

25 A. Skyline Steel.

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De Mey - Cross

1 Q. So PilePro is presenting on this Web site that the
2 manufacturer of this product is ArcelorMittal; isn't that
3 correct?

4 A. It is, yes.

5 Q. And that the distributor of this product is Skyline Steel;
6 isn't that correct?

7 A. It is.

8 Q. Nowhere on here are they claiming that they're affiliated
9 with either ArcelorMittal or Skyline Steel; isn't that correct?

10 MR. BANDINI: Objection.

11 THE COURT: Overruled.

12 A. Correct.

13 Q. An engineer looking at this would know who ArcelorMittal
14 was or is; right?

15 A. Some do; some don't, yes.

16 Q. And an engineer, who you would agree is sophisticated in
17 the industry, would know who Skyline Steel is; isn't that
18 correct?

19 A. Same answer. Some do; some don't.

20 Q. Do you see -- let's go back to the first page -- above the
21 product I.D., who does it -- what is the name that's written
22 there?

23 A. ArcelorMittal.

24 Q. It doesn't say PilePro here, does it?

25 A. Not there. Just above it says.

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De Mey - Cross

1 Q. Right. But right above the product it says ArcelorMittal,
2 doesn't it?

3 A. It does, yes.

4 Q. So this is identifying the manufacturer of the product?

5 A. Uh-huh. Yes.

6 Q. And under "Top Product Alternatives," what does it say?

7 A. It gives two alternatives, another HZM solution from
8 ArcelorMittal and then an O-Pile solution 4131.

9 Q. But the first listed alternative is another ArcelorMittal
10 product, in fact, another HZM system; isn't that correct?

11 A. It is, yes.

12 Q. And if you flip back over to the second page, five of the
13 other alternative products listed are ArcelorMittal products?

14 A. It may have a longer lead time, but yes, on this chart
15 here.

16 Q. You don't think that's good advertising for your company?

17 A. No, it's negative advertising. I don't think it's good
18 advertising, no.

19 Q. Now, you said you visited --

20 THE COURT: All right. Ms. Ghavimi, we'll stop there
21 since it's 4:59.

22 Ladies and gentlemen, we're going to break for the
23 evening. Let me just remind you that tomorrow please be here
24 no later than, I would say, a couple minutes before 9:00
25 o'clock in the morning. We will start no later than 9:15. I

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De Mey - Cross

1 like to have you guys in the box with Mr. De Mey continuing in
2 his testimony at that time.

3 As I said, I'll do everything in my power to get you
4 guys out as quickly as I can and certainly within the time I
5 promised, but I need you to play your part as well, and that
6 part is to get here on time. We can't -- counsel, can you
7 please refrain from talking until I'm done. Thank you.

8 I need you to be here on time because we can't start
9 until all eight of you are here. So I know, particularly on
10 days like today with the weather we had, it can take a little
11 longer to make your way around the city. I know plenty of you
12 are coming from Westchester and elsewhere. If you could just
13 cushion the amount of time you need to get here to make sure
14 you're here on time, it would be really helpful if we could
15 start here on time.

16 Just a reminder, to entice you to be here on time, we
17 will have some breakfast and coffee in the jury room, assuming
18 that the cafeteria obliges and delivers what we have ordered.

19 And then a couple even more important reminders,
20 number one, do not discuss the case with each other, with your
21 friends, your family. Again, you can tell people that you have
22 been selected to serve as a juror on a civil case, but please
23 don't tell anyone anything beyond that.

24 Number two, don't communicate about the case in any
25 way, shape, or form -- telephone, person, e-mail, Twitter,

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De Mey - Cross

1 anything. All right. Again, it can only cause trouble for you
2 and for all of us.

3 Third, don't do any research about the case or anyone
4 involved in the case.

5 And, finally, please continue to keep an open mind.
6 You've heard some of the evidence. You've heard the opening
7 statements, but there's plenty more evidence to come, and it's
8 certainly not time for you to form any judgments.

9 Again, just a reminder, please go directly to the jury
10 room tomorrow morning, and please be there a couple minutes
11 before 9:00 so that we can start promptly. And with that, I
12 wish you a very pleasant evening. I thank you for your
13 attention. And you are excused. Thank you.

14 (Jury excused)

15 THE COURT: You may be seated. Mr. De Mey, you may
16 step down. All right.

17 (Continued on next page)

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1 (Jury not present)

2 THE COURT: All right. Just so you know, plaintiff
3 has 12 hours 41 minutes remaining in its time, and defendant
4 has nine hours and 45 minutes remaining in its time.

5 Two things that I want to raise. One is -- and this
6 is directed to both sides -- I really prefer that you not sort
7 of invoke the jury in your questioning. Just ask your question
8 but don't explain to the jury, read to the jury, remind the
9 jury. It's not necessary, and I would rather you just get to
10 the point and ask your question.

11 Second, I did want to just raise the listing of
12 PilePro in Skyline's catalog, which was obviously subject of
13 some examination as well. I don't know anything about this
14 issue other than what you mentioned earlier, but I'm struggling
15 to understand what its relevance and significance is, how it's
16 being used, and I don't know how it relates to the settlement
17 agreement that Mr. Badini referred to earlier. Does anyone
18 want to fill me in here?

19 MR. BADINI: Yes, your Honor. First of all, with
20 respect to your first issue, I do that as a matter of habit,
21 and I apologize and I will try to restrain myself.

22 THE COURT: All right. I will cure you of the habit
23 by the end of this trial but hopefully before that. Go ahead.

24 MR. BADINI: Second, we are very concerned about that.
25 The settlement agreement explicitly provided that Skyline had

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1 certain obligations to list PilePro and its products and how
2 folks could get in touch with PilePro to buy its products in
3 the Skyline catalogs. Defendant is trying to take that
4 contractual obligation and turn it into some type of
5 endorsement of PilePro's statements of lead times and other
6 things, and we think that's prejudicial and it requires at a
7 minimum a curative instruction.

8 THE COURT: A curative instruction to what effect?

9 MR. BADINI: To the effect that yesterday you heard
10 that Skyline carried references to PilePro in its catalog. The
11 jury is instructed that it was required to do so contractually
12 and is not to infer from that that it was somehow endorsing
13 PilePro or PilePro's representations on its website. Something
14 to that effect.

15 THE COURT: All right. Ms. Ghavimi?

16 MS. GHAVIMI: Your Honor, it's our position that what
17 is good for the goose is good for the gander. They designated
18 this exhibit. It's a document that was in circulation at the
19 time. The infringement warning was present and at the time
20 that they sued PilePro. We have carefully avoided mentioning
21 this settlement agreement. Yes, they had a contractual
22 obligation to list the website in their catalog, however, we
23 are not using it for that purpose. They can't take away the
24 fact that it was there and that customers saw it. Just as we
25 can't take away the fact that the infringement warning and

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1 other actions were on the website. It is out there and is what
2 people saw. This case is about the effect on the public,
3 certain members of the public, and the evidence that was out
4 there. It is our position that it constitutes a waiver of
5 their trademark claims of our use of their name on the
6 trademark, not with respect to the infringement warning, but
7 they have other claims that we infringed -- which we believe
8 are baseless -- by placing their name on the iSheetPile
9 website, simply by identifying the product by its manufacturer
10 that we have infringed their trademark. It is our position
11 that they have waived that through placing the PilePro website
12 in their catalog presenting it to the public. Customers could
13 view that. They could go to the PilePro website, see
14 iSheetPile website and therefore imply a connection between the
15 companies. We are not saying that the connection was based on
16 a settlement agreement. We are not going to mention that.
17 Your Honor has ruled on that. However, if they are claiming
18 that we infringed their trademark and unduly implied that we
19 were associated -- we unduly claimed an association with
20 ArcelorMittal and Skyline vis-a-vis infringing their trademark
21 simply by listing their names on our website, then we have
22 every right to identify for the jury that our website was
23 listed in their catalog. It doesn't matter how it got there.

24 THE COURT: Well, there are a lot of things being
25 mushed together and mixed together. I guess let me start by

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1 just saying do you have any authority for the proposition that
2 listing the PilePro website in the catalog would constitute a
3 waiver of their trademark claims, let alone where that is done
4 as a contractual obligation pursuant to a settlement agreement
5 in an entirely separate dispute? Do you have any legal
6 authority for that proposition?

7 MS. GHAVIMI: Well, I have not researched it yet, but
8 I can assure you that I will find some.

9 THE COURT: Good. So why don't you find some. Until
10 you find some, this argument isn't going to be made. And if
11 you don't find any, I will instruct the jury that they are not
12 to put any weight on that, that that was done pursuant to a
13 legal obligation, and it has no significance with respect to
14 the claims in this case.

15 Now, separate and apart from that, do you agree that
16 the listing in the catalog was a product of the settlement
17 agreement between the parties, that they were required to do
18 that?

19 MS. GHAVIMI: Yes.

20 THE COURT: OK. Good. Well, you have a couple days
21 to come up with authority for the proposition that would
22 support the argument you're making. If you don't come up with
23 it, this argument isn't going anywhere, and I'm going to
24 provide a instruction. It strikes me as a far fetched one, and
25 I fail to see how it could possibly constitute a waiver

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1 pursuant to a settlement agreement years before they are
2 contractually obligated to provide that information in their
3 catalog, and that that would somehow give you carte blanche to
4 do whatever you want to do on your website and violate their
5 trademark and falsely accuse them of infringing. It just
6 strikes me as a completely farfetched argument.

7 MS. GHAVIMI: Your Honor, it's our position that in
8 the minds of the public, the reason the website is in their
9 catalog is irrelevant because the effect of the presence of the
10 website in the catalog is the same. It's not as if the catalog
11 says, yeah, we're only required to put this in here because of
12 a settlement agreement.

13 THE COURT: Well, were you authorized to use the
14 trademark that was registered to ArcelorMittal and that Skyline
15 was licensed to use?

16 MS. GHAVIMI: It wasn't registered at the time.

17 THE COURT: It is today, and there is testimony that
18 even as late as last week that trademark was still being used
19 on the website. So, do you have authorization to use that
20 trademark, and do you have any argument that by listing the
21 PilePro website, which then links to another website, that that
22 would somehow constitute authorization to use their trademark?

23 MS. GHAVIMI: We don't have authorization. We have
24 defenses of fair use, license, and may have additional defenses
25 that we will present in our closing on the naked license that

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1 came out during testimony today.

2 THE COURT: All right. Well, again, I don't -- this
3 strikes me as a real stretch, and I can't imagine that there is
4 any authority out there that would support an argument of
5 waiver. I'm not going to cross the bridge of the various
6 doctrines that you just invoked, but you should certainly be
7 prepared to support me with authority that would support those
8 arguments as well, because I don't see it based on the listing
9 of the website in their catalog, which again was pursuant to a
10 legal obligation.

11 So, we will table it and see if defendant can come up
12 with any legal authority, and then we will decide what to do
13 from there.

14 Now, anything else we need to discuss other than the
15 remaining deposition designations for the Maake deposition?

16 MR. BROWN: Yes, your Honor. On their expert --

17 THE COURT: Microphone.

18 MR. BROWN: Mr. Persampieri, their expert witness, I
19 believe that some of his materials are designated attorneys
20 eyes only. I know that was done in a lot of areas in this
21 case, and I'm wondering if that is still relevant now, or if
22 that no longer applies as I'm preparing for the cross of him,
23 because it will be in court, and I would like to prepare for it
24 using my client. Am I allowed to give it to my client to
25 prepare for the cross of that particular witness? That's my

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1 question.

2 THE COURT: For some reason there is a picture of a
3 baby on my screen. All right.

4 MR. BROWN: That's not us, your Honor.

5 THE COURT: Mr. Badini?

6 MR. BADINI: This has come out of the blue. I would
7 be happy to discuss it with counsel this evening and see what
8 he has in mind and work out a reasonable accommodation. I told
9 counsel earlier today that we are likely to call Mr.
10 Persampieri last, so we have some time to make that call.

11 THE COURT: Great. Why don't you see if you guys can
12 work it out, and we can revisit it if there is a dispute. If
13 it doesn't get reraised, I will assume you have resolved it.

14 MR. BROWN: And a scheduling matter. Are we certain
15 that we would be on trial Monday if we don't finish Thursday?
16 Or is there a chance we would start on Tuesday?

17 THE COURT: Why on earth would we?

18 MR. BROWN: I don't know. I don't know if there are
19 any other trials that might come up on the criminal docket on
20 Monday.

21 THE COURT: Nope. Before we get to Maake, can you
22 tell me who is on tap for tomorrow, Mr. Badini, after
23 Mr. De Mey finishes?

24 MR. BADINI: There is also another open issue, unless
25 you want to discuss the schedule first. You're the boss, your

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1 Honor.

2 THE COURT: Why don't you tell me who is on tap for
3 tomorrow and then --

4 MR. BADINI: Let me check my schedule. So we will
5 finish De Mey. We are playing Madonna, and then intend to call
6 Mr. Wendt. And, depending on how far we get, then we would
7 play McShane, Maake and Wheeler, I believe, in that order.

8 THE COURT: OK. And are there depositions coming down
9 the pike after that? And when do you expect to get me --

10 MR. BADINI: Yes, there are, your Honor. The
11 tentative order after that is Messrs. Whitworth, Williams and
12 Mitchell, and then we would probably end with Ms. Gorog and Mr.
13 Persampieri. And I believe we were shooting for tonight or
14 tomorrow morning -- I don't know; I'm looking at my
15 colleagues -- for the other designations.

16 MS. WESTCOTT: We had intended to --

17 THE COURT: Microphone. Thank you.

18 MS. WESTCOTT: Sorry. We had intended to provide the
19 court with the remainder of the designations tonight for
20 discussion tomorrow morning if need be. I did have one
21 question on that. We got an order last night to ECF file the
22 designations. Of course the designated testimony is now going
23 to be public, but if there is confidential information in them,
24 do you want us to redact? Because we would be filing the whole
25 transcript.

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1 THE COURT: And I assume the confidential portions are
2 not any of the designated portions.

3 MS. WESTCOTT: Well, certainly at least the ones that
4 are designated will no longer be confidential after they've
5 been read.

6 THE COURT: So, let me modify what I said. I didn't
7 take that into account in my order. I do ultimately want these
8 things to be part of the public record, but why don't you
9 submit them by e-mail, as you did yesterday, and then with the
10 understanding that after I have resolved all the disputes, that
11 you can redact anything that is not going to be played that is
12 subject to a confidentiality agreement, but that certainly the
13 subjects, the testimony that is the subject of those disputes
14 has to be made part of the record so it's clear. All right?

15 MS. WESTCOTT: Thank you.

16 THE COURT: I can't guarantee that I will be prepared
17 to talk about the remaining depositions tomorrow morning, but
18 it doesn't sound like they would likely be played tomorrow, and
19 my hope is I would get those to you if not before tomorrow
20 morning, then tomorrow afternoon.

21 All right. What else before Maake?

22 MR. BADINI: Before Maake? Your Honor, right before
23 the Mr. De Mey cross, I was handed two defendants exhibits, 107
24 and 108. We are having a hard time, given the way the
25 defendants exhibit list is presented in the pretrial order, and

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1 given the fact that these have no Bates numbers, to figure out
2 whether they were produced and whether they are on the exhibit
3 list. So perhaps counsel can illuminate us, because we can't
4 figure out whether they were on the exhibit list or not.

5 MS. GHAVIMI: Your Honor, I sent these exhibits to
6 counsel this morning, and we have not had a chance to meet and
7 confer on them. I don't know what their objections are. I
8 guess we can discuss it here.

9 THE COURT: Well, I think their first objection is
10 that they don't know what they are. But they are not on your
11 exhibit list that was filed in the joint pretrial order?

12 MS. GHAVIMI: One of these documents, the one that
13 says Exhibit A -- OK, let me pull them out.

14 D 107 are attachments that are referenced in --

15 THE COURT: It's a yes or no question. Are these on
16 the exhibit list that you attached to the joint pretrial order?

17 MS. GHAVIMI: No. D107 is incorporated by reference
18 to a document that is on our exhibit list. These are documents
19 that were produced at the deposition of John Madonna by John
20 Madonna. That's why they do not have Bates numbers.

21 THE COURT: OK. And what is the reason that these
22 were not listed on the exhibit list?

23 MS. GHAVIMI: Because they were not produced
24 electronically, I did not have access to them. In the
25 preparation for this trial I added them as I was preparing.

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1 All I can say is two months ago I did not have them and decided
2 that they were relevant because they were referenced in other
3 documents that are on our exhibit list.

4 THE COURT: They are not coming into evidence. I made
5 clear at the final pretrial conference on Wednesday that the
6 exhibit list attached to the pretrial order was final unless
7 good cause could be shown for anything not appearing on that
8 list. You obviously did have possession of these at least at
9 the time of the Madonna deposition. You certainly have had
10 ample time in the two months since the joint pretrial order was
11 prepared and the exhibit list was attached to it to propose
12 that they be added without any prejudice or any issue of that
13 sort. The fact that you didn't have copies in a certain format
14 when your cocounsel obviously did, this is the latest instance
15 of two hands of counsel not talking to each other. It isn't
16 good cause, and they're not coming into evidence. Next.

17 All right. Let's talk about Maake, and then I will
18 let you go for the evening.

19 I think there are four designations that I wanted to
20 talk about. The first is on page 40. No, excuse me, 20. It's
21 a PilePro objection, so does somebody at the back table want to
22 fill me in? That is you folks.

23 MR. BROWN: That would be this table?

24 MS. GHAVIMI: I'm sorry, your Honor. I need to pull
25 it up.

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1 MR. BADINI: While they're pulling it up, your Honor,
2 I don't want to run afoul of any of the court's practices.
3 Given that Mr. De Mey is still on the stand, is there any rule
4 as to communications with him? Different courts have done
5 different things in my experience.

6 THE COURT: Let me put it differently. Mr. Ramos or
7 Ms. Ghavimi, do you have any views as to whether and to what
8 extent counsel can communicate with Mr. De Mey, who is
9 obviously a corporate representative here but he is on cross?

10 MS. GHAVIMI: Considering the fact that I'm going to
11 be asking him questions about similar issues that I had just
12 asked questions today, I believe that they should not be
13 allowed to discuss the case since it's intermingled with his
14 testimony.

15 THE COURT: All right. Mr. Badini, do you have any
16 objection if I instruct you that you are not to communicate
17 with Mr. De Mey except for logistical and scheduling issues?

18 MR. BADINI: Well, provided the same rule applies to
19 Mr. Wendt.

20 THE COURT: It certainly would if we break during his
21 cross-examination. So what is good for the goose is good for
22 the gander, as Ms. Ghavimi just put it.

23 MR. BADINI: Sure. I have no objection.

24 THE COURT: Good. So let's do that and err on the
25 side of caution.

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1 All right. Ms. Ghavimi, are you prepared to walk
2 through the Maake deposition now?

3 MS. GHAVIMI: Yes, your Honor.

4 THE COURT: All right. Can you point me to your
5 objection to page 20 to 21.

6 MS. GHAVIMI: We don't see how the fact that Ms. Maake
7 bills PilePro on an hourly basis is relevant -- they didn't ask
8 this question of other PilePro employees -- how it's relevant
9 to any of her testimony on this matter.

10 THE COURT: All right. Mr. Restagno, are you taking
11 the lead here to too?

12 MR. RESTAGNO: Yes, your Honor. Thank you.

13 So, first of all, Ms. Maake is not an employee of
14 PilePro. She was a contractor employed by PilePro to render
15 services. It is our position that this time is relevant and
16 goes to foundation for the rest of the testimony establishing
17 the relationship with PilePro and also to her credibility as a
18 witness.

19 THE COURT: All right. The objection is overruled.

20 Next is page 63. It's a Skyline objection. So, Mr.
21 Restagno, back to you. 63, 64.

22 MR. RESTAGNO: Thank you, your Honor. So we object to
23 this testimony on relevance grounds. What we have here is
24 testimony to the effect that iSheetPile was intended to be a
25 site where customers compare solutions and not an e-commerce

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1 site.

2 The specific issues of the case as they pertain to the
3 Request a Quote feature is our allegations that the site misled
4 customers by effectively giving the bait and switch, showing
5 them one product and then directing them to another, on top of
6 other problems with the website being false lead times and the
7 infringement warning and so on. Whether this site was intended
8 to be an e-commerce site with a shopping cart feature is not
9 relevant to the issues of the case.

10 THE COURT: Can you just eliminate for me who is
11 Ms. Maake? What is her role here?

12 MR. RESTAGNO: Your Honor, Ms. Maake served as a
13 liaison between PilePro and the software engineers that made
14 the website, specialized in marketing and PR.

15 THE COURT: All right. Ms. Ghavimi, I certainly think
16 you are entitled to argue that from the evidence that has been
17 admitted, namely the website itself, that there is no shopping
18 cart and it's just an informational tool and so forth. But
19 what possible relevance does her intentions have?

20 MS. GHAVIMI: Well, this is not her intentions, your
21 Honor. She is talking about the intention of the website as
22 she was instructed for it to be created.

23 THE COURT: But my -- let me rephrase. What relevance
24 does the intention of the creators of the website have to the
25 issues in this case? In other words, again, you could make the

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1 argument that there is no shopping cart, this is just providing
2 information and, therefore, it's not confusing, and it's not
3 misleading, and it's not going to divert sales and so on and so
4 forth. But what relevance does the intention of the folks at
5 PilePro or elsewhere in setting up the website have?

6 MS. GHAVIMI: Because the jurors are going to be
7 looking at the website. They don't have the website to
8 interact and move around and decide for themselves. They are
9 going to be looking at screen shots and making a decision based
10 on what they see and what other people who have used it who are
11 going to be saying when you go here you get a quote. And a lot
12 of this case is about the motivations of what the website is
13 about. Skyline is arguing this is a bait and switch. It is
14 intended to draw customers in, to select, view the product by
15 infringing our trademark, advertising this, clicking on it,
16 requesting a quote, and then they don't actually give you or
17 sell you a product and switch one of their own. So, testimony
18 about how the website was never intended to be that way is
19 certainly relevant, because that's actually how it is not. And
20 that's how we are going to argue it's not. It just serves that
21 it was never like that at all and it is not like that, contrary
22 to how Skyline is going to be arguing and presenting their
23 testimony.

24 THE COURT: All right, the objection is sustained. I
25 think you can certainly make the argument from the website

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1 itself that it's not a bait and switch and what have you, but I
2 don't see what relevance their intentions have. And to the
3 extent that the jury is limited to the screen shots, that's a
4 product of counsel's decision to try the case in the manner
5 that you are trying it. You certainly could have figured out
6 some way to capture in a more dynamic fashion the website short
7 of the proposal made last week to do it on a live basis.

8 Next is page 138, PilePro's objections. This is
9 really 138 through 140, and part of my problem is I don't know
10 what the exhibits being referenced here are.

11 Ms. Ghavimi?

12 MS. GHAVIMI: Your Honor, we object to this testimony
13 to the extent that, one, it refers to the placement of the
14 infringement warning on the website, that they're trying to
15 attribute an e-mail exchange between Ms. Maake and Mr. Wendt
16 and imply ownership and some kind of authorization, when we
17 believe Mr. Wendt is here. They can ask him that question
18 himself.

19 This testimony is irrelevant and will be prejudicial
20 because we do not have the opportunity to cross-examine
21 Ms. Maake or this document. I don't know if they intend to use
22 these documents or introduce them into evidence with Mr. Wendt.
23 We haven't received their proposed exhibits.

24 And, you know, they are just talking about exhibits.
25 You know, there is no exhibits in front of the jury to look at.

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1 So, I mean it's kind of -- it's just going to confuse the jury
2 because they are just talking about e-mails, and it's really
3 nothing relevant to --

4 THE COURT: All right. Well, Mr. Restagno, let me
5 turn to you, and let me also pose a broader question, which is
6 to the extent that the portions of the depositions do reference
7 exhibits, is it the parties' intention to offer those in
8 connection with the deposition?

9 MR. RESTAGNO: It is, your Honor. And furthermore, I
10 will note that PilePro has not objected to either of those
11 exhibits, despite objecting to this testimony, which is
12 entirely relevant, as it deals with e-mail exchanges concerning
13 the '543 patent.

14 THE COURT: All right. And again just as a process
15 matter, is the plan to say we're playing the deposition and
16 pursuant to the deposition we offer the following exhibits? Is
17 that the way you were planning to proceed?

18 MR. RESTAGNO: Yes, the exhibits will be shown on the
19 screen, your Honor.

20 THE COURT: OK. And I am guessing, as they often are,
21 they are not necessarily going to correspond to the numbers
22 used in the deposition? Is that a fair assumption?

23 MR. BADINI: I believe with only one exception --
24 which I believe is Madonna where somebody screwed up -- they do
25 correspond, at least on the plaintiff's side, with the ones

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1 that are in the pretrial order.

2 THE COURT: All right. The objection to the testimony
3 we are discussing is overruled. And then more broadly what you
4 should plan to do is when you say we next call by video
5 deposition Ms., you know, Kristin Maake or whatever it is, and
6 pursuant to that deposition offer the following exhibits, and
7 then we can deal with those. Let's make sure there are no
8 objections before that's done, and that any potential
9 objections outside the presence of the jury. And then if there
10 is a discrepancy between the number that was used in the
11 deposition and the number that is being used at trial, make a
12 record of that, and I will make sure that the jury understands
13 that issue.

14 All right. The last designation at issue is pages 161
15 to 162. This is a Skyline objection. Mr. Restagno?

16 MR. RESTAGNO: Yes, thank you, your Honor. So, this
17 testimony is objectionable. It deals almost entirely with the
18 circumstances of Mr. McShane leaving PilePro as observed by
19 Ms. Maake. We think it is entirely irrelevant and potentially
20 prejudicial.

21 THE COURT: Ms. Ghavimi?

22 MS. GHAVIMI: Your Honor, as we said before, yesterday
23 or this morning -- I forget -- it is our position that
24 Mr. McShane was a disloyal employee, and it is also our
25 testimony that it was his decision to place the warning and

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1 content of the warning on the website, and he was the person
2 who interacted with Ms. Maake, and this testimony regarding her
3 communication and relationship with him "When I first started
4 at PilePro, Gerry was my go-to person" is highly relevant.

5 MR. BADINI: Your Honor, I hate to jump in here, but
6 Mr. Restagno would not know this, because he has been dealing
7 with the deposition designations. But this is precisely why
8 there is a problem with introducing other litigation into this
9 case. PilePro has made precisely this same argument that
10 Mr. McShane was a disloyal employee in the arbitration between
11 Mr. McShane and Mr. Wendt, and the arbitrator soundly rejected
12 that and ruled against Mr. Wendt. And now they want to
13 resurface the same theory after it has been adjudicated against
14 them. And if they resurface that theory, it would only be fair
15 for us to introduce the finding in the arbitration that
16 Mr. McShane was not a disloyal employee. And that's the
17 problem with this testimony.

18 THE COURT: All right. I'm going to sustain the
19 objection. I don't think this has much probative value with
20 respect to even making the argument that Mr. McShane was a
21 disloyal employee. It just basically says in her opinion that
22 there were unusual circumstances surrounding his departure, and
23 it really doesn't have much more to inform it. And I also
24 think on Rule 403 grounds, in light of the issues that Mr.
25 Badini just mentioned, that it would raise all sorts of

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1 problems. So that objection is sustained.

2 All right. I think that covers all the depositions
3 that have been presented. Any last issues for tonight? It's
4 been a long day. I am happy to let you guys go.

5 Mr. Badini, you are going to prepare a proposed
6 curative instruction with respect to the spoliation issue.
7 Obviously the sooner you can submit that -- and you should do
8 so by ECF -- the better, and we will take it up at some point
9 tomorrow.

10 Please be here a few minutes before nine, and let my
11 staff know if there are issues to discuss, as I'm guessing
12 there will be. I will plan to be on the bench no later than
13 nine. And I want Mr. De Mey on the stand and everyone ready to
14 go with the jury at 9:15.

15 All right. I wish you all a pleasant evening, and I
16 will see you tomorrow morning.

17 MR. BADINI: Thank you, your Honor.

18 (Trial adjourned to November 30, 2016 at 9:00 a.m.)
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